TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted]. 46.

THE CITY OF MINNEAPOLIS, APPELLANT,

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 20, 1907.

(20,952.)

(20,952.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 234.

THE CITY OF MINNEAPOLIS, APPELLANT,

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Pleas before the honorable the Judges of the Circuit Court of the United States of America, for the District of Minnesota, for the April Term, A. D. 1907, of said Court, held in the city of Minneapolis, in said District, in the year 1907.

DISTRICT OF MINNESOTA, *ss:*

Be it Remembered that on this 31st day of May, A. D. 1907, came the complainant above named by M. D. Munn and N. M. Thyseson, its attorneys, and filed in the Clerk's Office of said Court its amended bill of Complaint herein, in the words and figures following to-wit:

2 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Amended Bill of Complaint.

To the honorable the judges of the circuit court of the United States, in and for the district of Minnesota, sitting at the city of Minneapolis, in Hennepin county, in said State:

The Minneapolis Street Railway Company, by leave of the Court in that behalf first had and obtained, and by the consent of counsel for the respondent, brings this, its Amended Bill of Complaint.

The Minneapolis Street Railway Company of the City of Minneapolis, Hennepin County, Minnesota, a corporation, organized
3 and existing under and by virtue of the laws of the State of Minnesota, being a citizen of said state and an inhabitant of said city, brings this, its Amended Bill of Complaint, against the City of Minneapolis, a municipal corporation, organized and existing within said Hennepin County, under and by virtue of the laws of the State of Minnesota, and being a citizen of said state.

And thereupon your orator complains and says:

I.

That complainant is a corporation and was duly organized and created on the first day of July, in the year 1873, under and by vir-

tue of the Laws of Minnesota for a period of fifty years from said first day of July. That a true and certified copy of the Articles of Incorporation of this complainant is hereto attached, marked Exhibit "A" and made a part of this complaint. That thereafter Section 1 of said Articles of Incorporation of your orator was duly amended so as to authorize your orator to build a line of railway extending from the city limits of respondent to Fort Snelling and also the City of St. Paul, in Ramsey County. That a certified copy of said amendment is hereto attached, marked Exhibit "B" and made a part of this complaint. That thereafter, under and pursuant to the laws of the State of Minnesota, and during the month of February, 1907, the life of complainant's corporate charter was duly extended by the adoption of the resolutions set forth in Ex-
4 hibit "C" hereto attached and made a part of this complaint, so that complainant is now a corporation under and by virtue of the laws of the State of Minnesota with charter rights as such corporation until March 1st, 1937, and the life of complainant's charter extends to March 1st, 1937. That all of the statutory requirements relating to the adoption of each of said amendments have been complied with by the complainant. That complainant was organized for the purpose and with the power, among other things, of owning and operating street railway lines within said City of Minneapolis, and the building, owning and operating of railroads within Hennepin County, Minnesota. That it now owns and operates various lines of street railway hereinafter in this Bill more particularly set forth.

II.

That the respondent is a municipal corporation, duly authorized and existing under and by virtue of the laws of the State of Minnesota, and has been such since long prior to July 1st, 1873, and was on said July 1st, 1873, and ever since has been, possessed of the authority and power to grant to corporations or persons the right to construct, maintain and operate street railway lines along and upon the streets within its corporate limits, and at all of said times was and ever since has been a citizen of said State of Minnesota, and an inhabitant of said Fourth Division of the District of Minnesota,
5 and that as respects the matters and things hereinafter set forth as to ordinances affecting said complaint, said respondent acts under delegated power from the Legislature of the State of Minnesota, and in so acting, has duly made sundry contracts with your orator, under which your orator is now operating its said lines of street railway in said City of Minneapolis, as is more particularly hereinafter set forth.

III.

Your orator further says that this cause is a suit in equity of a civil nature, and that the matter in dispute and controversy in this action, exclusive of interest and costs, or either, exceeds the sum of five thousand ($5,000.00) dollars. That this cause is a suit arising under the Constitution of the United States in this,—that your orator seeks relief against the respondent by this Bill by reason and on

account of an attempt on the part of respondent to enforce against your orator a law of the State of Minnesota and an ordinance that was passed by its Common Council, impairing the contract rights of your orator, and the enforcement and operation of which, if permitted, will take from your orator its property without due process of law, and deny to your orator the equal protection of law, all in contravention and in violation of the constitution of the United States, and especially contrary to and in violation of Section 1, of Article 14 of the Amendments to the Constitution of the United States,
6 and of Section 10, of Article 1 of the Constitution of the United States, as more fully and particularly set forth.

IV.

That on or about the 9th day of July, 1875, the Common Council of respondent, as authorized by its charter and the laws of the State of Minnesota, duly passed an ordinance entitled "An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis," which said ordinance was in terms as follows:

"The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company be and is hereby granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line, with all necessary tracks for turnouts, side tracks and switches, in such streets of said city as the City Council may deem suited to street railways, subject to the terms, conditions and forfeitures hereinafter contained; provided that the City Council reserves the right to limit the said company to the construction of a single track upon such street or streets as it may deem proper.

SECTION II. The aforesaid grant is upon the express condition that within four months from the passage of this ordinance the said company shall construct and put in operation a line of railway extending from the St. Paul & Pacific railroad crossing on Fourth avenue north, W. D., along Washington avenue to Hennepin avenue; thence on Hennepin avenue to and across suspension bridge
7 and Nicollet Island, up Central avenue, E. D., to Fourth street, and down Fourth street to Fourteenth avenue south, E. D.; and provided that within one year thereafter the said company shall construct and put in operation a line from Plymouth avenue in the West Division along Washington avenue to its intersection with the line at the St. Paul & Pacific depot on said Washington avenue, and also a line from Hennepin avenue along Washington avenue to Twelfth avenue south, and thence on the most practicable route to Franklin avenue, and that the line from Plymouth avenue north to Franklin avenue south on Washington avenue shall be constructed as one line; and, provided further, there shall be no forfeiture by reason of delay in completing the first line on account of the inability of said company to do within the said four months because of the said bridges not being built or repaired suited to receive the railway.

SECTION III. The City Council may at any time designate any other line of railway in the said city as a line demanded by the public necessities, and may also designate an extension of any existing line or lines; and in case said company, upon being notified of such designation, shall not within such reasonable time as shall be fixed by the City Council, construct and put in operation such line, then the City Council may charter to any other company the exclusive right to construct and operate a street railway in the street or streets so designated. And in case the said Minneapolis Street Railway Company shall at any time neglect to keep in operation any line of railway which it may have constructed, then, upon such reasonable notice as the City Council may prescribe, said company shall forfeit the exclusive right herein granted, so far as the same pertains to such neglected line; and the City Council may grant the exclusive
8 right to any other person or company to build and operate a street railroad upon such neglected line; provided that said company shall, if required by the City Council, after being notified in writing by the City Attorney, remove or cause to be removed the track and other materials of such neglected line within ten days after the service of said notice upon the President or Secretary of said company.

SECTION IV. The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as the said company deem advisable, provided that no propelling power or machinery of any sort shall be used after it shall prove to be a public nuisance, and said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council; but no locomotive, freight or passenger car, such as are usually run over the general railways of this State for the transportation of freight and passengers, shall be used upon any of said tracks unless authorized by the City Council; provided that the said Minneapolis Street Railway Company, and any other street railway company which the Council may charter under Section 3 of this ordinance, shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by the said companies, or as may be determined by the District Court of Hennepin county.

SECTION V. Said tracks and railway shall be used for the purpose of transporting passengers and freight, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities; provided said company shall at all times have the right to use their track for transporting iron, ties and other material for constructing their road and keeping the same in repair,
9 and for such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Minneapolis and said company.

SECTION VI. The track of said railway shall be laid so as to conform to the established grades of the streets on which the road may be built, whenever the same may have been graded by the city; but,

whenever the city shall change the grade of any street or streets or any portion thereof, the said company shall raise or lower the track so as to conform to such change of grade; where the streets are not graded to an established grade said company shall lay their tracks so as to conform to the surface of such streets; provided that they raise or lower the same to the grade when the city shall grade the same or any part thereof, and in case said city shall at any time pave or otherwise improve the surface of any street along which said railroad may run, said company shall pave or otherwise improve the space between the rails of their tracks unless otherwise provided by the City Council, so that it shall substantially correspond with the improvement of the street outside of the tracks, except in case pneumatic power is used when the company shall be required to pay only so much of the expense of paving the street as is made extra by reason of said railway; provided said company shall plank the space between the tracks and on both sides thereof at each street crossing whenever required by the Street Commissioner; and one plank shall be laid on the outside of each rail and on the inside when it shall be ordered by the City Council; and provided further, that the City Council hereby reserves the right to designate the style of rail to be laid by said company through the streets of the city.

10 SECTION VII. The said City of Minneapolis shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs. The City of Minneapolis hereby reserves the right to take up and remove the rails of the said road whenever it shall be necessary for the repair or improvement of the streets, or for laying water or gas pipes or sewers or for other public purposes on the streets of which such rails may be laid, and such repairs or improvements or works shall be made by the city without unnecessary delay, and the track of said road shall be taken up and relaid by and at the cost and expense of said company whenever the Council may require the same to be done.

SECTION VIII. The said company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided that the charge for carrying a person, including hand baggage, from one point to another within the city limits, whether by one or more lines operated by the same company shall not exceed five cents on any one line; provided, further, that the City of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the City Council of said city may deem just and reasonable; provided that the city shall not reduce the passenger's fare below five cents, over any one continuous line,

11 and what shall be considered a continuous line may be designated by the City Council of the said city, but that said Coun-

cil shall not designate any such continuous line to be more than three miles in length.

SECTION IX. The Council of the City of Minneapolis hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads during the continuance of the rights and privileges hereby granted.

SECTION X. Said tracks shall be laid in the center of the street in all cases where it is practicable to so lay them, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and said company shall keep the space between the rails in proper repair, so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at it own cost and expense.

SECTION XI. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully obstruct, hinder or interfere with any of said railway cars by placing, driving or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell, or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the Municipal Court of said City, be punished by a fine of not more than fifty nor less than five dollars and costs of prosecution, and may be imprisoned until such fine and costs are paid, not exceeding thirty days.

12 SECTION XII. It shall be the duty of such company to furnish and run a sufficient number of cars to accommodate the traveling public on all streets which they shall use or occupy for railroad purposes. All cars shall carry signal lights after dark.

SECTION XIII. It shall be the duty of said company to repair any and all damages done to the streets, curbs, sidewalks, gutters or other public property by the construction or repairing of the tracks along the streets, as herein provided for; and further, to protect and save harmless the city of Minneapolis against claims for damages arising from the construction or management of tracks and roads provided for herein.

SECTION XIV. Authority is hereby conferred on and said company is hereby required to lay double tracks over and across such bridges as may be on any of the streets occupied by them when so required by the City Council; said tracks on said bridges to be laid in such manner as the Committee on Roads and Bridges shall authorize and direct.

SECTION XV. The said Minneapolis Street Railway Company is hereby obligated to make such equitable and mutual terms (as the Councils of St. Paul and Minneapolis may determine) with the Street Railway Company of St. Paul, or such other company as may have the right to operate the street railway in St. Paul, as shall allow each of said two companies to run their cars into the

business centers of each of said cities over the tracks of each other without change of cars between the two cities.

SECTION XVI. The cars or carriages of the company shall be run upon and along the tracks of said railway company in conformity with the following rules and regulations; provided that nothing herein contained shall be construed as limiting the police power of the City Council as granted in Section 9 of this ordinance, to-wit:

(1) No car shall be run at a greater rate of speed than six miles an hour.

(2) While cars are turning corners or crossing bridges the horses or mules attached thereto shall not be driven faster than a walk, or, if other motive power be used, not faster than three miles an hour.

(3) Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet, except in cases of unavoidable necessity or accident, or when cars are near or at stations.

(4) No car shall be left to remain standing on any street at any time, unless the same is waiting for passengers or is unavoidably detained.

(5) No car shall be allowed to stop on a crosswalk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street or to take in or leave off passengers.

(6) The conductors and employes employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the cars shall be stopped when, by so doing, such injury may be averted.

(7) All proper care shall be used by conductors and employes to prevent injury to teams, wagons, carriages and other vehicles.

(8) The conductor shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

(9) Conductors shall announce to passengers in a distinct tone the names of all streets crossed as the cars approach such cross-
14 streets, and they shall observe the same rule when nearing the track of any other railway company.

(10) No car shall remain standing at any of the stations more than ten minutes, except at each end of the lines, and at the stations nearest the passenger depots of any other railway companies, at which excepted stations they may stand a longer time.

SECTION XVII. Within thirty days from the publication of this ordinance said company shall file with the City Clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed signed by the president and secretary of said company, and when so accepted this ordinance shall operate as a contract between the city and said company, and upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges or franchises whatsoever.

SECTION XVIII. This ordinance shall take effect and be in force from and after its publication."

Passed July 9th, 1875.

Approved July 17th, 1875.

Said ordinance was thereafter duly published on the 24th day of July, 1875, and was thereafter and on the 18th day of August, 1875, duly accepted in writing by your orator, as required by the terms of said ordinance.

V.

That thereafter, and on or about July 3rd, 1878, the City Council of the City of Minneapolis passed the following ordinance:

"SECTION 1. That the Minneapolis Street Railway Company, its successors and assigns, are hereby authorized to construct and maintain a street railway line upon and over the following named streets and avenues in the City of Minneapolis, viz:

Commencing at the intersection of Nicollet avenue with First street, running thence upon First street to First avenue south, thence upon First avenue south to Grant street, thence upon Grant street to Nicollet avenue and thence upon Nicollet avenue to the southern limits of the city.

With all the turnouts, switches, turn-tables and other appurtenances which may be convenient, and to operate such line of railway with animal, steam or other power.

Provided However, That the City Council of said city shall have the right at any time to prohibit the use of steam upon any part of said line wherever it shall deem the public good will be subserved by such prohibitions.

Provided, Further, That said line of street railway shall be completed in one year from the first day of July, A. D. 1878.

SECTION 2. That the Minneapolis Street Railway Company, its successors and assigns, in the construction, maintenance and operation of said line of street railway shall at all times be subject to all the conditions, limitations, and other provisions of an ordinance of said city, entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' passed July 9, 1875.

And the City Council and city government shall have all powers respecting said street railway line which is retained under the provisions of said ordinance with reference to the lines of railway mentioned therein.

SECTION 3. This ordinance shall take effect and be in force from and after its publication."

Passed July 3, 1878.

Approved July 10th, 1878.

Which said last named ordinance was thereafter, and on July 8th, 1878, amended as follows:

"SECTION 1. That section one (1) of an ordinance entitled 'An Ordinance authorizing the Minneapolis Street Railway Company to construct a street railway on certain streets and avenues of the City of Minneapolis,' passed on the third day of July, A. D. 1878, be and the same is hereby amended by striking therefrom the words, 'thence

upon First avenue south to Grant street, thence upon Grant street to Nicollet avenue,' and in the place and stead thereof inserting the words, 'thence upon First avenue south to Thirteenth street, thence upon Thirteenth street to Nicollet avenue.'

SECTION 2. This ordinance shall take effect and be in force from and after its publication."

Passed July 8, 1878.

Approved July 10, 1878.

VI.

That on the 4th day of March, 1879, the Legislature of the State of Minnesota duly passed Chapter 299 of the Special Laws for that year, entitled, "An Act to Confirm the Grant of the City of Minneapolis to the Minneapolis Street Railway Company," which said last named legislative act is as follows:

"An Act to Confirm the Grant of the City of Minneapolis to the Minneapolis Street Railway Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whereas the City of Minneapolis did, by ordinance, entitled, 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' passed by the City Council of said city on the ninth day of July, eighteen hundred and seventy-five, and approved by the mayor of said city on the seventeenth day of July, eighteen hundred and seventy-five, and by ordinance passed July third, eighteen hundred and seventy-eight, and amended July eighth, eighteen hundred and seventy-eight, and approved July tenth, eighteen hundred and seventy-eight, grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of said city, with certain rights and privileges in said ordinance particularly set forth; now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said company.

17

SEC. 2. This act shall take effect and be in force from and after its passage."

Approved March 4, 1879.

VII.

That between 1878 and September, 1890, the Common Council of respondent, pursuant to the terms and provisions of said ordinance passed July 9, 1875, designated additional streets and avenues within its corporate limits as being suitable for street railway purposes, and that public necessity required street railway lines thereon, and required your orator to build upwards of twenty-five miles of additional street railway lines thereon, all of which demands and requirements your orator complied with and built the lines of street railway so designated, and as required by said ordinance, and in so doing, your orator expended many millions of dollars. That in addition to such lines so designated, and which respondent required your orator to build under the terms and provisions of

18

said ordinance of July 9, 1875, your orator, prior to January 1st, 1890, built railway lines in the suburban territory outside of the city limits of Minneapolis, in said Hennepin county, which said lines connected with and formed a part of the system owned and operated by your orator within the limits of the City of Minneapolis. That since the building of such lines outside of the then limits of the City of Minneapolis, the city limits have been extended, so that such lines are now within the municipal limits of respondent. That your orator expended in building such last mentioned lines many thousands of dollars, all of which was known to respondent.

VIII.

That during the early part of the year 1889, respondent was desirous of having your orator build certain cable lines within the city limits of Minneapolis, and to change the so-called motor-line, the building of which was authorized by said ordinance passed July 3, 1878, as amended July 8, 1878, into a cable line, and with that end in view, your orator sent the following communication to respondent:

MINNEAPOLIS, MINN., *June* 7, 1889."

To the City Council of the City of Minneapolis:

The Street Railway Company will build a cable line on the line now operated by the motor, from Washington avenue or the Union depot to Thirty-first street, and have completed as soon as possible, commencing work at once, provided, that in case the crossing at the Hastings & Dakota railroad is changed so that the company
19 cannot operate its cars, the city will pay the actual cost of change and loss of business to the company by reason of stoppage of travel; such loss to be decided by arbitrators, one to be selected by the City Council and one by the company, and they to select the third.

Provided, further, that the company agrees to have the road completed by July 1, 1890; and provided further, that the street shall be paved as soon as the cable line is completed.

Respectfully, THOMAS LOWRY, *President.*"

And thereupon the Common Council of respondent duly adopted the following resolution:

"Resolved by the City Council of the City of Minneapolis:

That the proposition of the Minneapolis Street Railway Company, of date the 7th of June, A. D. 1889, to the City Council to build a cable line, be and the same is hereby accepted as amended herein, and the proper city officers be and are hereby directed to enter into a contract with the said Street Railway Company, agreeing that if said Street Railway Company will build a cable line on the line now operated as a steam motor line, from Washington avenue or the Union Depot in the City of Minneapolis to Thirty-first street, commencing work thereon at once, and completing the same by July 1, A. D. 1890, and agreeing further that the street or streets through which said cable line runs shall be paved and completed on or before November 1, A. D. 1890.

Provided, also, that the tracks of said cable line railway shall be of standard gauge."

Passed June 29, 1889.

Approved July 1, 1889.

20 That thereafter, respondent, being desirous of having your orator change certain of its existing lines of street railway to cable lines, and to thereafter operate the same by cable as a motive power, and also to have your orator make a test of electricity as a motive power to the end that if the same should prove successful, your orator should thereafter change the motive power on its street railway lines so that the same should be operated by electricity as a motive power, duly adopted the following resolution:

"Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company is hereby authorized and required to operate in the City of Minneapolis the part of its lines of street railway hereafter designated, by underground cable, in connection with stationary engines, such as are constructed and operated in street railway service upon what are known as cable lines, and to construct and maintain such cable lines in and upon the streets of the City of Minneapolis hereafter mentioned.

First. A cable line beginning at Twelfth avenue north and Washington avenue, thence south upon Washington avenue to the corner of Washington avenue south and Cedar avenue, which line shall be constructed and put in operation on or before Nov. 1, 1890, and when completed, the said Minneapolis Street Railway Company shall operate in connection therewith the following horse car lines, viz:

The line on Washington avenue from Twentieth avenue north to its terminus.

The line from Washington avenue on Twentieth avenue north to Penn avenue; thence on Penn avenue to its terminus.

21 The line from Washington avenue on Twentieth avenue north to Emerson avenue; thence north on Emerson avenue to Thirty-second avenue north.

The Riverside line and the line across Washington avenue bridge along Cambridge street.

Second. A cable line beginning at the corner of Bloomington avenue and Thirty-second street south; thence north on Bloomington avenue to Franklin avenue; thence on Franklin avenue to Eighth avenue south; thence on Eighth avenue south to Fourth street; thence on Fourth street to First avenue south; thence on First avenue south to the Union depot at High street, which line shall be built and put in operation on or before November 1, 1891, and when said line shall be completed the following horse car lines shall be operated in connection therewith, viz:

A line on Thirteenth avenue south, from Twenty-ninth street south to Franklin avenue, which line shall be completed and in operation on or before November 1, 1891.

The line on Eighth avenue south and Franklin avenue to its terminus.

Third. A cable line from the intersection of Lyndale and Hennepin avenues on Hennepin avenue across the bridge; thence on Cen-

tral avenue to Sixth street; thence on Sixth street to Third avenue southeast; thence on Third avenue southeast to Harrison street, thence on Harrison street to Twenty-ninth avenue northeast, which line shall be completed and put in operation on or before November 1, 1891, and when constructed and put in operation, all the East Side horse car lines, and on the West Side, the Lyndale and Douglas avenue horse car lines shall be operated in connection with this line, unless the City Council otherwise orders.

Said cable lines shall be constructed with double tracks and
22 shall be constructed on the most improved plan and of the best materials. The cars to be used on said lines shall be constructed and maintained with all of the latest improvements for the comfort and convenience of passengers, and shall be used for no other purpose than the transportation of passengers.

Said cable lines shall be constructed of 'standard gauge,' and the rail used shall be what is known as the 'Providence girder rail.'

The slot or opening in the slot-rail shall not exceed five-eighths of an inch, unless by permission of the Common Council.

No cable line shall be speeded at less than eight miles an hour and at such accelerated speed as the City Council may direct, and

Be It Further Resolved, That the City Council may designate one of the present street railway lines upon which said Minneapolis Street Railway Company shall experiment with electricity as a motive power, which experimental line shall be put in operation by said company not later than six months after such line has been designated, and when electricity, applied in any form upon such experimental line, shall have proved a practical success, then the said Minneapolis Street Railway Company may, and when ordered to do so by the City Council, shall, thereafter operate electric lines with the power applied in the manner which has proved a practical success on such experimental line upon such existing horse car lines as the City Council may designate as suitable for electric street railways.

Be It Further Resolved, That it be and is hereby determined that the public necessities demand the street railway extensions and the new lines hereinafter named and that therefore the Minneapolis Street Railway Company be, and is hereby required to construct and operate such extensions and new lines within the time hereafter stated, to-wit:

A horse car line on Penn avenue, from Crystal Lake avenue
23 to Thirtieth avenue north, which line shall be completed on or before November 1, 1890.

A horse car line on Emerson avenue from Twentieth avenue north to Thirty-second avenue north, to be completed on or before November 1, 1890.

To continue their Hawthorne avenue line across Laurel avenue to Cedar Lake road, in case Laurel is first opened and bridged across the tracks of the St. Paul, Minneapolis & Manitoba and the Minneapolis & St. Louis railroads, and in case Ontario avenue is first opened and bridged, then across Ontario avenue bridge to Irving avenue; thence on Irving avenue to Erie avenue and on Erie avenue to Newton avenue; said lines to be put in operation within six months

after the completion of such bridge, to be operated with cars similar to those on the University avenue line.

The horse car line on Cedar avenue shall be extended to Thirty-seventh street as soon as the street shall be properly graded, and shall then be operated in connection with the Bloomington and Franklin avenue cable line, as the Council may decide.

A horse car line on Plymouth avenue, from Washington avenue to Girard avenue, which line shall be constructed and put in operation on or before November 1, 1890.

The Sixth street horse car line, which is now operated up Eighth avenue south, when the Eighth avenue cable line shall be completed, shall be continued down Sixth street to Ninth avenue south; thence on Ninth avenue south from Sixth street to Seventh street; thence on Seventh street to Cedar avenue; thence on Cedar avenue to Minnehaha avenue; thence on Minnehaha avenue to Franklin avenue; thence on Franklin avenue to the Franklin avenue bridge.

Be It Further Resolved, That if the operation of said experimental railway line by electricity shall prove a practical success, said
24 company is hereby authorized and required to consfruct and operate an electric street railway line beginning at Twenty-seventh avenue northeast and Sixth street northeast; thence down Sixth street northeast to Seventeenth avenue northeast to Adams street; thence south on Adams street to Central avenue.

And also provided such experimental electric line shall prove a practical success, said railway company is authorized and required to construct and operate an electric line beginning at Thirty-fourth avenue north and Penn avenue; thence south on Penn avenue to Crystal Lake avenue; thence on Crystal Lake avenue to Twentieth avenue north; thence on Twentieth avenue north to Washington avenue; said lines to be constructed and put in operation within one year from the time such experimental line shall have proved a practical success; and

Be It Further Resolved, That said Minneapolis Street Railway Company, if it accepts the provisions of these resolutions, shall pay to the City of Minneapolis an annual tax or license fee of $25 per car for each and every car hereafter operated by it in said city, by either cable or electric power, to be paid on the first day of January of each year for the cars operated during the year previous.

And be it Further Resolved, That if the said Minneapolis Street Railway Company shall accept the provisions of these resolutions, it shall assume as soon as the proposed cable lines upon Washington avenue and First avenue south shall have been completed and are in operation, issue transfer checks to any passenger on any of its connecting lines who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on any connecting line, provided that no passengers shall be entitled to more than one transfer check for one fare, and
25 provided further that said transfer check shall be used only by the person receiving the same for a continuous passage and shall be used upon the next car departing on the connecting line upon which it is to be used.

Be it Further Resolved, That the rights and privileges hereby granted are upon the condition that the Minneapolis Street Railway Company shall, within ten days from the publication of these resolutions, file with the City Clerk of the City of Minneapolis its written acceptance of the provisions of these resolutions, accompanied by its bond, in the sum of $225,000 with good and sufficient sureties, to be approved by the City Council, and conditioned, that if said Street Railway Company shall neglect or fail to complete said cable lines, or either of them, or said experimental electric line within the time specified in these resolutions for the construction of such lines, it will forfeit to the City of Minneapolis $100,000 for each of said cable lines not built as hereinbefore provided, and $25,000 in case of default in constructing and operating said experimental electric line as herein provided.

Be it Further Resolved, That all the provisions, conditions and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' and all other ordinances of said city, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines, when not modified by the terms of this ordinance, except where by the conditions of said ordinance the said Minneapolis Street Railway Company is required to pave the street between its rails, it shall also pave that part of the streets on its lines operated by cable and electric power, between the tracks.

It being further understood that nothing in these resolu-
26 tions contained shall be considered as granting to said Minneapolis Street Railway Company any exclusive privilege or franchise not heretofore possessed by it."

Passed July 19th, 1889.

Approved July 26th, 1889.

That thereafter, and within the time provided in said Resolutions, your orator filed with the City Clerk of the City of Minneapolis its written acceptance of the provisions of the last above named Resolutions, which said acceptance was accompanied by a bond for $225,000, as provided in said Resolution, a true and correct copy of which said written acceptance and the Certificate of the Clerk of respondent as to the filing of the same is as follows:

"STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

Whereas, The City Council of the City of Minneapolis, on the 19th day of July, 1889, passed certain resolutions entitled, "Resolutions authorizing the Minneapolis Street Railway Company to construct cable and electric railway lines in the City of Minneapolis, and directing the building of new and extended horse car lines,' approved by the mayor of said city on the 26th day of July, 1889, and published in the official paper of said city on the 27th day of July, 1889, and,

Whereas, At a meeting of the Board of Directors of the Minneapolis Street Railway Company, held on the 1st day of August, A. D. 1889, it was resolved by said company to accept the provisions of said resolutions, and that an acceptance in writing, signed by the President of said company and under its corporate seal be filed with the City Clerk of said city, in accordance with the terms of said
27 resolutions, and a bond of said company in accordance with the provisions of said resolutions be also executed and filed;

Now, therefore, the said Minneapolis Street Railway Company has accepted and does hereby accept the provisions of said resolutions passed by the City Council of the City of Minneapolis as aforesaid, and has also executed and herewith tenders for approval of said Council and to be filed with said City Clerk, its bond, with good and sufficient sureties in the sum of two hundred and twenty-five thousand dollars ($225,000), conditioned as in said resolution provided.

In Witness Whereof, the President of said Minneapolis Street Railway Company has signed the acceptance and affixed hereto the corporate seal of said company this 1st day of August, A. D. 1889.

THE MINNEAPOLIS STREET RAILWAY CO.
By THOMAS LOWRY, *President.*

[SEAL.]

STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

I, L. A. Lydiard, City Clerk of the City of Minneapolis, in the County of Hennepin and State of Minnesota, do hereby certify that the attached is a true and correct copy of an acceptance to a resolution entitled, 'Resolution authorizing the Minneapolis Street Railway Company to construct cable and electric railway lines in the City of Minneapolis, and directing the building of new and extended horse car lines,' which said acceptance was filed with the City Clerk of the City of Minneapolis, and by him presented to the City Council of said city at a meeting thereof held August 2nd, 1889.

28 In Witness Whereof, I have hereunto set my hand and fixed the corporate seal of said city this 3rd day of December, A. D. 1889.

[SEAL.] L. A. LYDIARD,
City Clerk."

That thereafter the Common Council of respondent passed the following resolution:

"Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company is hereby authorized to erect poles and string wires thereon, on its Fourth avenue line from its present southern terminus on Thirty-fourth street to Third street; thence on Third street to First avenue south; and said company is hereby required and authorized to put in operation on said Fourth avenue line and Third street an electric street railway line, and to make all necessary connections, appliances and construction, in order to make a thorough test of electricity as a motive power for street car service; and the City Council do hereby designate said

Fourth avenue line and Third street as the line on which electric power shall be tested, according to the conditions of a resolution passed by the City Council, published July 26th, 1889."

Passed Sept. 6, 1889.

Approved Sept. 14, 1889.

That after the passage of the two resolutions last above set forth, your orator proceeded to make a test of electricity as a motive power, as provided in said resolutions. That thereafter, the Common Council of respondent duly passed the following resolutions:

"The City Council of the City of Minneapolis do ordain
29 as follows:

SECTION 1. That the Minneapolis Street Railway Company, its successors and assigns, are hereby authorized to construct and maintain a double line of its street railway with double tracks of standard gauge upon and over the following named streets and avenues in the City of Minneapolis, viz: Commencing on University avenue at the city limits; thence on said University avenue to Cambridge street; thence on Cambridge street to Washington avenue; thence on Washington avenue to Fifteenth avenue south; thence on Fifteenth avenue south to Third street; thence on Third street to First avenue south, with all turnouts, switches, turn-tables and other appurtenances which may be necessary and convenient, and to operate the same by electricity as a motive power, and erect and maintain upon and along said streets and avenues such poles, wires, or other appliances, as may be necessary to operate said line by electricity, under the supervision and approval of the City Engineer, provided, however, that on University avenue from the city limits to Cambridge street, that poles shall be erected in the center of the street with cross-trees placed thereon, from which wires shall be suspended.

SEC. 2. The said line shall be constructed and in operation on or before July first (1st), 1890.

SEC. 3. This ordinance is granted upon the express condition and requirement that the said Minneapolis Street Railway Company shall pay to the City Treasurer of the City of Minneapolis on the first Monday of January of each year after said line is constructed, an annual tax or license fee of twenty-five dollars per car for the average number of cars operated by it on said line or on any portion thereof during the next preceding year.

30 SEC. 4. In the construction, maintenance and operation of said line of railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances now in force or hereafter adopted by said city, as far as applicable, and shall also be subject to all the provisions of a resolution passed by the City Council of the City of Minneapolis, July 19, 1889, and approved July 26, 1889, so far as the same is applicable.

SEC. 5. This ordinance shall take effect and be in force from and after its publication."

Passed Sept. 27, 1889.
Approved Oct. 3, 1889.
Published Oct. 4, 1889.

"Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company be and is hereby permitted and authorized to substitute experimental electric street railway lines substantially similar to the one heretofore constructed and now being operated on Fourth avenue south, on the conditions hereinafter contained, on the following lines:

First. On the two lines which by the resolutions of the Council passed July 19th, 1889, and approved July 26th 1889, and by resolution of the Council passed June 29th, 1889, and approved July 1st, 1889, it was authorized and by its agreement made in pursuance to said resolutions it agreed to construct and put in operation
31 cable lines during the year 1890, to-wit: The Washington avenue and First avenue lines.

Second. On any of its existing horse car or motor lines where it may desire and shall make such substitution during the year 1890.

Provided that said company shall within thirty days after the passage of this resolution accept the above permission and agree to the following conditions.

A. If at any time on or before April 1st, 1891, the City Council shall determine any or all of said electric lines to be unsuccessful or not equal to the cable lines ordered, then this resolution shall be of no further force or effect, and the Council may order cable lines substituted for said electric lines on the Washington avenue and First avenue lines according to the terms of the previous agreement, and may also order the discontinuance of electricity as a motive power on any of the other lines that it may see fit where it is substituted under the terms of this resolution.

B. Said company shall not run on said electric lines more than two cars attached together, one of which shall be the motor car, and the trolley lines maintained by said company shall have such guards to prevent accidents as the Council shall from time to time direct.

C. Said experimental electric lines substituted for cable lines shall be built and put in operation within the time prescribed by said resolution for building and putting in operation said cable lines respectively, for which electric lines are substituted.

D. The provisions of said resolution of July 19th, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby except in the particulars above indi-
32 cated.

E. In case any other electric system preferable to the overhead wire system shall prove a practical success in other cities, the Council shall have the right to designate any existing line operated by the Street Railway Company as the line on which to experiment with said new electric motive system, and said Company shall at once proceed to equip said line so designated with said new electric

system; and if after the same has been operated six months, the Council deems it a practical and superior power to the overhead system, the Council shall have the right to order the entire existing street railway system, or any line or lines thereof to be operated with such new electric motive system.

F. The sureties on the bond executed for the faithful performance of the agreement made pursuant to the said resolution of July 19th, 1889, shall in writing within thirty days signify their consent to the modifications of said agreement as contained herein, or the Minneapolis Street Railway Company shall substitute a like bond satisfactory to the City Council.

G. If the said City Council shall not at any time on or before April 1st, 1891, determine electricity to be an unsuccessful motive power, then the said Minneapolis Street Railway Company shall equip with electricity and put in running order all its then existing horse car or motor lines by December 1st, 1891.

H. All passenger cars on all electric lines shall run between extreme limits on all extensions to the heart of the city without change to passengers traveling thereon.

I. Wherever any electric or cable line crosses any city bridge the weight of the rolling stock, together with the loads they
33 may be required to carry, shall not be in excess of the weight that shall be determined upon by the City Engineer as a safe load upon such bridge and whenever or wherever city bridges are crossed by any line of street railway, the kind of rail to be used shall be of such pattern as to have a flange of not less than five inches in width and shall be subject to the approval of the City Engineer, and wherever it may be determined by said Engineer that any part or portion of said bridge requires strengthening on account of the conditions of loading, necessitated by the use of said bridges for street railway purposes, said Street Railway Company shall be required to make the necessary changes at its own cost and expense. All changes made to be under the direction and to the satisfaction of the City Engineer."

Passed Jan. 17th, 1890.
Approved Jan. 20th, 1890.

"Resolved, By the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company be and are hereby permitted to extend their Riverside avenue line, to be operated by electricity as heretofore authorized by this Council from the terminus of said line on Twenty-seventh avenue south to Minnehaha avenue and along Minnehaha avenue to Fiftieth street, subject to the regulations and limitations relative to said Riverside avenue line, contained in all resolutions and ordinances now in force.

Provided that said extension be completed on or before October 1st, 1891."

Passed March 28th, 1890.
Approved April 1, 1890.

"Resolved, By the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company be and are
34 hereby permitted to extend their Fourth avenue electric street car line along Fourth avenue from Thirty-fourth street to Thirty-eighth street, connecting with their present line at Thirty-fourth street, provided said extension be completed on or before the first day of October, 1890, subject to all regulations and limitations relating to the present electrical line."

Passed March 28th, 1890.

Approved April 1st, 1890.

That thereafter, and within the time provided in said resolutions, your orator accepted the same as therein provided, and proceeded to and did construct such electric lines as were required by said resolutions, and also changed the motive power of said lines, where so authorized, to electricity, and began operating said lines with electricity as a motive power, and has complied with all of the terms and conditions thereof. That in building said lines and in making all of said tests and changes your orator expended large sums of money, all of which was done pursuant to the terms and provisions of said resolutions, and in reliance upon the right of your orator to charge and collect Five Cents for each passenger transported upon any of its said lines, as provided in said Ordinance of July 9, 1875.

That thereafter respondent did, on the 19th day of September, 1890, by and through its Common Council, duly adopt the following Ordinance:

"The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Com-
35 pany, its successors and assigns are hereby authorized to operate all its existing lines of street railway in the City of Minneapolis, and all its lines hereafter constructed in said city, by electricity as a motive power; and to erect, construct and maintain upon and along the several streets and avenues of said city, where such lines are, or may be located, all such poles, wires, conduits or other appurtenances and appliances as may be necessary to operate said lines of railway by electricity. Provided that upon all said railway lines where poles are used, except the line now in operation, known as the Fourth avenue line, the poles shall be erected in the center of the street with cross trees placed thereon from which the wires shall be suspended, and shall be so erected under the supervision and approval of the City Engineer of said city.

SEC. 2. All the lines of street railway in the City of Minneapolis heretofore constructed by said Street Railway Company and now in operation, and all new lines and extensions of existing lines heretofore ordered by the City Council of the City of Minneapolis, or the building of which has by ordinance or resolution of said City Council been authorized, shall be constructed, completed and fully equipped for operation by electricity as a motive power, the St. Paul line, the Washington avenue line and the First avenue line on or before November 1st, 1890, the Hennepin avenue and Harrison street line on or before November 1st, 1891, and all other lines on or before December 31st, 1891.

SEC. 3. Said railway lines shall be constructed of the standard gauge, and shall be built upon the most approved method, so as to interfere as little as practicable with all other public uses of the streets, and both material and workmanship shall be the best of their class and kind, and the cars used on said lines shall
36 be constructed and maintained with all of the latest improvement for the comfort and conveyance of passengers, and shall be used for no other purpose than for the transportation of passengers, and the cars upon said lines shall be run at a rate of speed not less than an average of eight miles per hour. Where the streets through which said railway line runs are paved, or the surface thereof otherwise improved at the time the said lines are constructed, or at any time thereafter, the said company shall pave or otherwise improve the space between the rails of their tracks and between their tracks, so that it shall substantially correspond with the improvement of the street outside of the tracks.

SEC. 4. No more than two cars attached together shall be run on any of said lines except by special permission of the City Council, one of which shall be the motor car; and the trolley lines maintained by said company shall have such guards to prevent accidents as the City Council shall from time to time direct.

SEC. 5. In case any other electric system preferable to the overhead wire system shall prove a practical success, the City Council shall have the right to designate any existing line, operated by said Street Railway Company as a line on which to experiment with said new electric motive system, and said company shall at once proceed to equip said line so designated with said new electric system; and, if after the same has been operated six months the City Council deems it a practical and superior power to the overhead wire system, it shall have the right to order the entire existing street railway system, or any line or lines thereof, to be operated with such new electric motive system.

SEC. 6. Passenger cars on all said lines shall run between
37 extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change to passengers traveling thereon and after November 1st, 1890, said Street Railway Company shall issue transfer checks at the junction of said lines, at Washington and Hennepin avenues, to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on either of said connecting lines provided that no passenger shall be entitled to more than one transfer check for one fare and provided further, that such transfer check shall be used only by the person receiving the same for a continuous passage and shall be used upon the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues.

SEC. 7. This ordinance is granted upon the express conditions and requirement that said Minneapolis Street Railway Company shall pay to the City Treasurer of the City of Minneapolis, on the first Monday of January in each year, commencing with the first Monday of January in the year 1892, an annual tax or license fee of twenty-five ($25) dollars per car for the average number of cars operated by it on its said lines of street railway during the next preceding year.

SEC. 8. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance
38 entitled 'An Ordinance authorizing and regulating Street Railways in the City of Minneapolis,' passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable.

SEC. 9. The said Street Railway Company shall hold the City of Minneapolis harmless from all damage of any kind whatsoever which may be caused by the work of construction in connection with putting up or maintaining poles or electric wires for said electric street railway lines, or which may be caused by reason of said poles and electric wires being placed and maintained as herein authorized.

SEC. 10. Before this ordinance shall be in force or effect, the said Street Railway Company shall accept the same by filing with the City Clerk of said city its written acceptance thereof, within thirty days from the passage of this Ordinance, agreeing to carry out all the matters and things herein contained and all the rights hereby granted are conditioned upon the faithful performance by said Street Railway company of all the agreements herein contained on its part to be done or performed.

SEC. 11. This ordinance shall take effect and be in force from and after its publication, and acceptance by said company as hereinbefore provided."

Passed September 19th, 1890.

Approved September 22d, 1890.

That thereafter and within thirty days from the passage of said last named Ordinance, your orator duly filed with the Clerk of said respondent, its written acceptance of the same.

That your orator thereupon proceeded to and did change
39 the motive power upon all of its other lines of railway on which your orator had not been authorized or required to change the motive power by respondent prior to September 19th, 1890, to electricity, and proceeded to and did install a system by which it has ever since operated all of its street railway lines within the corporate limits of said respondent with electricity as a motive power, as required by the ordinances and resolutions of respondent. That in so doing your orator has expended many millions of dollars, and in order to raise the funds necessary for that purpose, has executed and sold its bonds to the extent of many millions of dollars. That in so changing its motive power to electricity, as herein alleged, your orator

has done so solely in reliance upon its right under said ordinance and contract of July 9, 1875, to charge Five Cents for each passenger riding upon its said lines, and your orator has never consented to any change or modification of Section 8 of said ordinance of July 9, 1875, and it has never agreed or consented that respondent should reduce said fare below Five Cents; and has never intended so to do; nor is there any agreement between your orator and respondent, or any ordinance passed by respondent and accepted by your orator which in any way changes the terms and conditions of said Section 8 of said ordinance of July 9, 1875, save and except that in the passage and acceptance of said ordinance of September 9, 1890, your orator, under Section 6, thereof agreed to issue transfer checks
40 to any passenger paying one full fare, which transfer check, should entitle the passenger so receiving the same to a continuous passage upon a connecting line. That since the passage of said ordinance of September 19, 1890, respondent has frequently designated streets, not then occupied by your orator, as suitable for street railway purposes, and directed your orator to construct street railway lines thereon, all of which designations and directions have been made under and pursuant to the terms of and under the power and right reserved in said ordinance of July 9, 1875, and as therein provided, and your orator has always complied with each and all of said directions and requests and built said lines, and is now operating the same as a part of its system within the city limits of respondent, using electricity thereon as a motive power, as provided and authorized in said ordinance of September 19, 1890. That respondent has ordered upwards of fifty miles of new lines and extensions of existing lines since the passage of said ordinance of September 19, 1890, as hereinabove alleged, and your orator has built each and all of said new lines, and extensions so ordered by resolutions of the Common Council of respondent, and the following is a portion of the resolutions so passed for that purpose, to-wit:

"Resolved by the City Council of City of Minneapolis:

That the lines hereinafter named are demanded by public necessity, and that the Minneapolis Street Railway Company is hereby authorized, directed and required to construct a single or
41 double track line of electric street railway on the following named parts of streets and avenues in the City of Minneapolis, to-wit:

On Fifth street south, from Hennepin avenue to Fourth avenue south.

On Second avenue south, from Washington avenue south to Sixth street south.

On Fourth avenue south, from Washington avenue south to Third street south.

On First avenue north, from Washington avenue north to Fifth street north.

On Third street north, from Hennepin avenue to First avenue north.

And to connect such lines, and the tracks thereof, with the present lines and tracks of said street railway company in said city with all

proper curves, turn-outs, switches and appliances. And to erect and construct upon and along said parts of said streets and avenues all such poles, wires and other appliances as may be necessary or proper to operate said lines by electricity. And to maintain and operate all of the same, and the street cars to be used on said lines, hereby authorized by electricity as a motive power, in connection with the present lines of street railway of the said street railway company in said City of Minneapolis. When such lines are constructed the same shall be limited as to time to existing ordinances relating to street railway lines in said city."

Passed Dec. 23d, 1904.

Approved Dec. 27th, 1904.

"Resolved by the City Council of the City of Minneapolis:

That the lines hereinafter named are demanded by public necessity, and that the Minneapolis Street Railway Company is hereby authorized, directed and required to construct a double track
42 line of electric street railway on the following named parts of streets and avenues in the City of Minneapolis, to-wit:

On East Thirty-eighth street, from Chicago avenue to Twenty-eighth avenue south.

On Twenty-eighth avenue south, from Thirty-eighth street to Fiftieth street.

On East Fiftieth street, from Twenty-eighth avenue south to Minnehaha avenue.

And to connect such lines and the tracks thereof, with the present lines and tracks of said street railway company in said city, with all proper curves, turn-outs, switches and appliances. And to erect and construct upon and along said parts of said streets and avenues, all such poles, wires and other appliances as may be necessary or proper to operate said lines by electricity. And to maintain and operate all of the same, and the street cars to be used on said lines, hereby authorized, by electricity as a motive power, in connection with the present lines of street railway of the said street railway company, in said City of Minneapolis. When such lines are constructed the same shall be limited as to time to existing ordinances relating to street railway lines in said city."

Passed April 14th, 1905.

Approved April 17th, 1905.

"Resolved by the City Council of the City of Minneapolis:

That a line of street railway is required by public necessity on Grand avenue, extending from Lake street to Fortieth street, in the City of Minneapolis and that the Minneapolis Street Railway Company be and it is hereby directed to build such a line on Grand avenue, from Lake street to Fortieth street, as provided in Section 3 of that certain ordinance, passed by the Council on July 9, 1875."

Passed April 5th, 1907.

Approved April 11th, 1907.

43 "Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company be and it is hereby required and directed to extend the Emerson avenue line, so-called, by a double track line, from its present terminus at Emerson and Thirty-second avenue north, in said City, north on Emerson avenue to Thirty-third avenue north, thence westerly to Fremont avenue, thence north on Fremont avenue to Thirty-sixth avenue north.

The said extension is hereby designated as an extension demanded by public necessity, and the construction of the same is ordered as provided in Section 3 of an ordinance passed July 9th, 1875."

Passed April 5th, 1907.

Approved April 11th, 1907.

Your orator further alleges that it has complied with all of the said ordinances and resolutions hereinbefore set forth, save and except in so far as it has been relieved therefrom by respondent.

IX.

That after the change of motive power from animal to electricity, as hereinbefore alleged was accomplished, and the system of your orator put in full operation as an electric street railway system, respondent was desirous of having your orator establish a transfer station near the central portion of the city, and with that end in view, on the 25th day of November, 1892, passed the following resolution:

"Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company is hereby
44 authorized and permitted to erect a building to be used as a Transfer Depot on the following described tract of land, to-wit:

All that parcel of land in the City of Minneapolis, lying within the triangle formed by the extension in a northeasterly direction of the northwesterly curb line of Nicollet avenue and the southeasterly curb line of Hennepin avenue, and a line drawn parallel to and fifty feet northeasterly from the water tables of the northeasterly end of the City Hall building as it now exists, between the aforesaid Nicollet avenue and Hennepin avenue.

In consideration of the above permission the said Minneapolis Street Railway Company, shall pay to the City of Minneapolis annually the sum of one thousand dollars ($1,000.00), payable semi-annually in advance, on the first day of January and on the first day of July of each year. Should the removal of the scales and watering trough near the City Hall be necessary, the expense of said removal shall be paid by the said Minneapolis Street Railway Company.

The right to use the land herein specified as above prescribed, shall cease at the end of ten years from the passage of this resolution, unless renewed by the City Council. At the time of such renewal, the amount of the annual payment herein provided to be made by the said Street Railway Company in consideration of the

privilege herein granted, may be changed if the City Council shall so desire."

Passed Nov. 25th, 1892.

Approved Nov. 26th, 1892.

That thereafter the Common Council of respondent passed the following ordinance:

"An ordinance amending an ordinance entitled: 'An ordi-
45 nance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity,' passed Sept. 19, 1890, and approved Sept. 22, 1890, as amended by an ordinance passed Nov. 25, 1892, and approved Nov. 26, 1892.

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That section six (6) of an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity,' passed Sept. 19, 1890, and approved Sept. 22d, 1890, as amended by an ordinance passed Nov. 25th, 1892, and approved Nov. 26th, 1892, be and hereby is amended so as to read as follows:

'Passenger cars on said lines shall run between extreme limits on extensions to or near the intersection of Hennepin and Nicollet avenues, without change to passengers traveling thereon; and the said company shall establish and maintain a central transfer station or building at some point on Hennepin avenue between the union depot and Washington avenue, which shall be heated and lighted and kept in suitable condition for the accommodation of its patrons, which said central transfer station or building shall be constructed and put in operation not later than May 1, 1893. It shall also establish five additional transfer points, as follows: One at the corner of Cedar avenue and Washington avenue; one at Twentieth avenue north and Washington avenue; one at Second street northeast and Central avenue; one at Washington avenue and First avenue south, and one at the corner of Oak street and Washington avenue southeast, at which points it shall issue a transfer to any passenger on any of said lines who shall pay one full fare; which transfer shall entitle
46 the passenger so receiving the same to a continuous passage on connecting lines at the places above mentioned, provided that no passenger shall be entitled to more than one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on the connecting line on which it is to be used; but said company shall not be required to issue transfers for through travel, to or from the Interurban cars now operated, or that may hereafter be operated, between the cities of Minneapolis and St. Paul; provided, that transfers for local transportation shall be issued to and from Interurban cars to all persons using said cars for local travel, the company, however, having the right, in lieu of giving such transfers to and from Interurban cars, to operate local cars along said line with the same transfer privileges as on other

lines, the same to be run with such frequency as will reasonably accommodate the local travel thereon, and not more than ten (10) minutes apart. And all Interurban cars to continue to stop at the same number of crossings as at present and at such other crossings as the Council shall hereafter direct.

If any of the cars operated upon any of the present existing lines of said street railway shall not run to said central transfer station or building, transfer checks shall be given to and from such cars, at the connecting points nearest thereto.

Should the city provide land for the central transfer station or building, the said company shall build said central transfer station or building at an expense of not less than five thousand ($5,000) dollars, which shall be heated and lighted, and kept in first-class manner for the convenience of the public. The sum of one thousand ($1,000) dollars shall be paid to the city annually for the use of said land. Should the central transfer station or building
47 be built on land provided for by the city, said company shall be allowed to relocate its main line of tracks so as to run a single line of track on each side of the central transfer station or building, thence connecting with the present main line. The platform of such central transfer station or building shall be of such height that the passengers can step from it to the platform of the car. The said company shall provide attendants, who shall assist people in getting on and off cars and give information desired.

Open cars of the most approved pattern shall be provided and operated during the summer months on all of the lines.

Sewers shall be built in all streets before new lines shall be ordered, or existing lines shall be ordered extended thereon, and said company shall only be required to construct the lines so ordered between the 1st of April and the 1st of November.

SEC. 2. This ordinance shall take effect and be in force from and after its publication and acceptance by the Minneapolis Street Railway Company, which acceptance shall be made and filed within thirty (30) days after the passage of this ordinance."

Passed Dec. 23rd, 1892.

Approved Dec. 29th, 1892.

That thereafter, and within the time specified in said last named ordinance, your orator duly filed its acceptance of said ordinance, which acceptance was filed with the City Clerk on the 7th day of January, 1893.

X.

48 Your orator further alleges that respondent claims and asserts the right to reduce, without your orator's consent, the amount to be charged by your orator for each passenger riding upon its street railway lines, below five cents, and claims the right and authority to change the terms of your orator's contract, and especially the right of your orator to charge and collect five cents for each passenger, under Section 8 of said Ordinance of July 9th, 1875, without your orator's consent, and to that end and for the purpose of so changing the terms of said contract and reducing the

fare for each passenger below five cents without your orator's consent, the Common Council of said respondent attempted to and did pass, without your orator's consent the following ordinance:

"*An Ordinance*

Amending an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity,' approved September 22, 1890, as subsequently amended.

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That Section 6 of an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity,' approved September 22,
49 1890, as subsequently amended, be and the same is hereby further amended by inserting immediately before the words, 'passenger cars on said lines,' in the first line of said Section 6, the following:

The rate of fare which said company may charge for the transportation of passengers for a continuous passage over any street railway line or lines of said company in the City of Minneapolis as herein provided shall not exceed the sum of five cents for each passenger, and said company and its successors shall sell and provide for the sale of tickets, each good for transportation of one passenger for a continuous passage over the street railway lines of said company in said city as herein provided, at the rate of not less than six tickets for twenty-five cents.

SECTION 2. This ordinance shall take effect and be in force from and after its publication.

Adopted February 9, 1907."

Which said ordinance was passed by the Common Council of said respondent on the 9th day of February, 1907.

Your orator further alleges that it is the declared intention and purpose of said respondent to attempt to enforce against your orator's contract rights and privileges the said ordinance, reducing the rate of fare your orator is entitled to charge under its said contract with said respondent, and said respondent threatens to, and unless enjoined by this Honorable Court, will, if possible, so enforce the same against your orator, and by various means will attempt to compel your orator to reduce its rate of fare in violation of its said contract rights.

That said ordinance so passed on said 9th day of February, 1907, and approved and signed by the Mayor of said city of Min-
50 neapolis on the 18th day of February, 1907, will take effect and be in force from and after its publication according to the laws of the State of Minnesota, and according to the charter of said City of Minneapolis. That said City of Minneapolis now threatens, and is about to publish said ordinance, thereby causing it to go into effect.

XI.

Your orator further alleges that, before it could at law demonstrate the invalidity of said ordinance by adjudication upon the same, a multiplicity of suits would ensue, and great inconvenience and conflict and trouble would arise from the refusal of your orator to recognize the validity of said ordinance; that said ordinance will go into effect from or about the 22nd day of February, 1907, unless said City of Minneapolis be restrained from publishing the same by this Court, and your orator will be compelled to submit to and carry out said ordinance unless the respondent be so restrained from publishing said ordinance, and causing it to go into effect; and if your orator should refuse to submit to and comply with said ordinance, in the absence of an injunction restraining its enforcement, the City, through its mayor, common council and law department, with their employes and representatives, will, as your orator is informed and believes and alleges, proceed to enforce said ordinance and put the same into immediate effect upon the publication thereof, and compel your orator to comply therewith by taking steps and
51 measures to forfeit or attempt to forfeit the charter, franchises and privileges so owned by your orator, for alleged violation of said ordinance of February 9th, 1907, and institute, or cause to be instituted, suits or other proceedings against your orator, its officers, conductors, or agents, with the design of putting said ordinance into operation and effect, and of compelling your orator, its officers, conductors, or agents, to accept less than five cents fare, and to sell tickets at the rate of six for twenty-five cents; and upon your orator's refusal so to do, will make complaints and charges of violation of said ordinance and prosecute and institute proceedings to forfeit the charter, franchises and privileges of your orator, and to annul its corporate existence, for alleged violation of said ordinance. Your orator says that an attempted enforcement of said ordinance would result in personal conflicts and altercations between passengers and conductors, with possible breaches of the public peace and arrests and probable disturbance, and that great and permanent loss of business and good will would follow from such conflicts and disturbances; that a multiplicity of suits would arise between your orator and the respondent city and its citizens and passengers on the various lines of street railway of your orator, in different courts, at the same time, and your orator will be put to great expense, trouble and loss in defending suits in various courts, leading to uncertainty or complication as to the rights of the said respondent and
52 its citizens and your orator in the premises; that public interest and welfare and the rights of your orator require the trial and adjudication of such rights and duties in one form, and that, in equity and good conscience, your orator should not be subjected to the great loss, expense, inconvenience and damage to which it will be subjected by the enforcement, or attempted enforcement of said alleged ordinance; and your orator says that it has no adequate remedy at law to protect itself against the enforcement of said ordinance, unless this Court at this time enjoins the publication of said ordinance, as herein prayed.

XII.

Your orator further alleges that respondent pretends, alleges and will allege, contrary to the truth, that it has the power and authority to fix and regulate the rate of fare to be charged by your orator on its street railway lines within the corporate limits of said respondent, and that it was in the exercise of such power and authority that respondent passed the ordinance referred to in subdivision eleven above, and in that connection your orator alleges that respondent has no power or authority under its charter or otherwise to either fix or regulate, or to reduce or change the rate of fare which your orator may charge, save and except such power and authority as is given in section eight of said ordinance of July 9th, 1875, as ratified by the Legislature of this State by said Chapter 299 of the
53 Special Laws of this State for the year 1879, hereinbefore set forth.

Your orator further alleges that the only power or authority in that regard possessed by said respondent is conferred by and through said ordinance of July 9th, 1875, and its subsequent ratification by the said State legislature.

XIII.

Your orator further alleges that it has a vested property right under and by virtue of said ordinance passed July 9th, 1875, to charge and collect a fare of five cents for each passenger riding upon its cars within the corporate limits of the respondent during the corporate life of your orator, which does not expire till March 1st, 1937, and that an enforcement of said ordinance of February 9th, 1907, by respondent or its Common Council, or any of its officers or agents, will involve direct, immediate and irreparable injury to your orator's said vested property rights.

Your orator avers that the adoption of said ordinance of February 9th, 1907, and any enforcement of the same against your orator is in violation of the Constitution of the United States and particularly of Section 10 of Article 1 thereof, and of Article 14 thereof in that said ordinance and any enforcement thereof will impair the obligation of your orator's contracts with respondent, and if enforced against your orator will take your orator's property and property rights without due process of law.

54 XIV.

Your orator further alleges that unless said respondent, its officers, agents and employés are enjoined by this Honorable Court from attempting to enforce said ordinance of February 9th, 1907, the persons patronizing the lines of street railway owned and operated by your orator, will demand that your orator sell to them six tickets for twenty-five cents, and will attempt to enforce the terms and provisions of said ordinance against your orator, which your orator verily believes will result in innumerable suits by individuals against your orator in their effort to compel your orator to so sell tickets as provided in said ordinance, all of which will result in a multiplicity of suits to the irreparable damage of your orator.

That the only remedy left to your orator is the relief herein sought and prayed for, and that your orator has no adequate remedy at law for such injury and damage so about to be wrongfully inflicted upon it and its property and property rights, all which actions, doings, threats, intentions and conduct of said respondent are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof and for as much as your orator is remediless in the premises at and by the strict rules of the common law and can only have relief in a Court of Equity where matters
55 of this nature are properly cognizable and relievable, and to the end, therefore, that the respondent herein may answer the several matters and things hereinbefore set forth, and that this Court may decree that said ordinance of said City of Minneapolis passed February 9th, 1907, entitled "An Ordinance Amending an Ordinance entitled, 'An Ordinance Authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity,'" approved September 22nd, 1890, as subsequently amended, is null and void and of no effect with respect of your orator, and that said ordinance and the change of fare provided thereby and the provisions thereof are unconstitutional and void. Your orator prays that the City of Minneapolis and the mayor and the common council of said city, and all officers, agents, attorneys, employés, representatives and departments of said city, and their respective agents, representatives and employés, and the director of law of said city and his associates and his assistants and agents, and their respective successors in office, be perpetually enjoined, restrained and prohibited from publishing or completing the publication of said ordinance, or from in any manner permitting others to publish or make valid said ordinance, or from putting said alleged ordinance into effect, and from instituting or authorizing or directing any suit or suits, action or actions, or any proceeding, against your orator or any con-
56 ductor or employé, or any officer, representative or agent of your orator, the object or purpose of, or relief, sought by, said action, suit or proceeding being to put said alleged ordinance into effect or to enforce any of its provisions; or to compel your orator or any officer, representative, conductor or agent of your orator, to accept less than five-cent fare, or to sell tickets as therein provided at the rate of six for twenty-five cents; and from making complaint for violation of said ordinance or any part thereof, and from instituting or prosecuting any action or proceeding for violation of said alleged ordinance or any part thereof, and from proceeding with or continuing any action or proceeding for violation of said alleged ordinance or any part thereof, whether complaint be made or said action be instituted by or on behalf of said City of Minneapolis or any other persons; and from instituting, directing, authorizing or asking leave to institute or proceed with any suit, act or proceeding for the recovery of any fine, penalty or forfeiture for violating said ordinance or any part thereof; and from bringing any suit, action or proceeding for the purpose of vacating

the charter or annulling the existence of your orator as a corporation, or the forfeiture of any of its privileges or franchises because or on account of the violation of said alleged ordinance or any part thereof, or any of its provisions.

And your orator prays that, in the meantime and during the pendency of this suit, said City of Minneapolis, the mayor
57 and common council of said city, and all officers, agents, employés, representatives and employés, and the director of law and his assistants, representatives, agents and employés, be enjoined and restrained as hereinbefore prayed for from attempting to publish, or continue any attempted publication of said ordinance of February 9th, 1907, and from attempting to bring any suits or actions as hereinbefore alleged, and that your orator may have such other and further relief as the nature of the case may require, and as to equity may appertain and seem equitable.

May it please your Honors to grant unto your orator a writ of subpœna to be issued out of and under the seal of this Honorable Court, directed to the said respondent, the City of Minneapolis, commanding said respondent to appear in this Court at some day certain, to be therein named, and to answer the premises, but not under oath, answer under oath being expressly waived, and abide by and perform such decree as may be rendered herein as your Honors may seem meet and proper in the premises.

MINNEAPOLIS STREET RAILWAY COMPANY.
By C. G. GOODRICH, *Vice President.*
M. D. MUNN,
N. M. THYGESON,
Solicitors for Complainant.

KOON, WHEELAN & BENNETT,
Of Counsel.

58 STATE OF MINNESOTA,
County of Hennepin, ss:

C. G. Goodrich, being first duly sworn, on oath deposes and says: That he is the Vice President of the Minneapolis Street Railway Company. That he has read the foregoing Amended Bill of Complaint, and knows the contents thereof, and that the same is true of his own personal knowledge. That the reason this verification is made by the deponent and not by the complainant is that the complainant is a corporation.

C. G. GOODRICH.

Subscribed and sworn to before me this 31st day of May, A. D. 1907.

H. H. HODSDON,
Notary Public, Hennepin County, Minnesota.

My commission expires March 15, 1913.

[Notarial Seal Hennepin County, Minnesota.]

59 EXHIBIT "A."

Articles of Incorporation of the Minneapolis Street Railway Company.

First. The name of this corporation is the Minneapolis Street Railway Company. The general nature of its business is to construct and operate railways in the street- and highways of the city of Minneapolis and its suburbs in the county of Hennepin state of Minnesota, and the principle place of transacting the said business is the said city of Minneapolis.

Second. The time of commencement of said corporation is the first day of July, A. D. 1873, and the period of continuance of the said corporation is fifty years thereafter.

Third. The amount of capital stock of the said corporation is two hundred and fifty thousand dollars, to be paid in as follows, five per cent. of the same at the time of subscribing for the said stock, and the balance in installments from time to time as the same shall be ordered by vote of the stockholders.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject is one hundred and fifty thousand dollars.

Fifth. The names and places of residence of the persons forming the said association for incorporation are D. Morrison, R. J.
60 Mendenhall, W. W. Eastman, W. D. Washburn, W. P. Westfall, R. B. Langdon, Wm. S. King, J. C. Oswald, W. W. McNair and Paris Gibson, all of whom reside in said city of Minneapolis.

Sixth. The names of the first board of directors of the said corporation are the same as the names of the above named incorporators. The government of the said corporation, and the management of its affairs shall be vested in its board of directors which shall be elected on the first Tuesday of July in each year.

Seventh. The number and amount of shares in the capital stock of the said corporation is twenty-five hundred shares, of one hundred dollars each.

Adopted, signed and sealed, this twenty-third day of June, A. D. 1873.

D. MORRISON.	[SEAL.]
R. J. MENDENHALL.	[SEAL.]
W. W. EASTMAN.	[SEAL.]
W. D. WASHBURN.	[SEAL.]
W. P. WESTFALL.	[SEAL.]
R. B. LANGDON.	[SEAL.]
WM. S. KING.	[SEAL.]
J. C. OSWALD.	[SEAL.]
W. W. McNAIR.	[SEAL.]
PARIS GIBSON.	[SEAL.]

61 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 23rd day of June, 1873, personally came before me D. Morrison, R. J. Mendenhall, W. W. Eastman, W. D. Washburn, W. P. Westfall, R. B. Langdon, Wm. S. King, J. C. Oswald, W. W. McNair and Paris Gibson, to me known to be the persons named in and who signed the foregoing articles of incorporation and acknowledged the same to be their free act and deed.

[SEAL.] D. A. SECOMBE,
Notary Public.

Filed in this office on the 24th day of June, 1873, at 2 o'clock P. M.

S. P. JEANNISON,
Secretary of State.

UNITED STATES OF AMERICA: STATE OF MINNESOTA, DEPARTMENT OF STATE.

I, Julius A. Schmahl, Secretary of State of the State of Minnesota do hereby certify that I have compared the annexed copy with record of the original instruments in my office of Articles of Incorporation of Minneapolis Street Railway Company, filed June 24, 1873, and recorded in Book B of Incorporations, page 695, and that said copy is a true and correct transcript of said record of said original instruments, and of the whole thereof.

In testimony whereof I have hereunto set my hand and
62 affixed the Great Seal of the State at the Capitol in Saint Paul this 20th day of May, A. D. nineteen hundred and seven.

[SEAL.] JULIUS A. SCHMAHL,
Secretary of State.

EXHIBIT B.

Know all men by these presents, that at a regular meeting of the stockholders of the Minneapolis Street Railway Company held on the first day of September, A. D. 1880, the following amended articles of incorporation of said company were, by a unanimous vote of all the shares of stock and all the stockholders of said company adopted, in lieu of the original articles, first, third, fourth and seventh of the articles of incorporation of said company, to-wit:

Amended Articles of Incorporation of the Minneapolis Street Railway Company.

Article First. The name of this corporation is the Minneapolis Street Railway Company. The general nature of its business is to construct and operate railways in the streets and highways of the city of Minneapolis and its suburbs, in the County of Hennepin, State of Minnesota, and to build and operate a railway from the south boundary line of said city, at or near the intersection of Min-

nehaha Avenue, to the Falls of Minnehaha, and to Fort Snelling in said county. And also to build and operate a railway from
63 the east boundary line of said city, on the east side of the Mississippi River, at or near its intersection with Fourth (4th) street southeast (S. E.) or University avenue, in said city to the city of St. Paul in the County of Ramsey or to any intermediate points between St. Paul and Minneapolis. And the principal place of transacting the said business is the said city of Minneapolis.

Article Third. The amount of capital stock of the said corporation shall be one million dollars to be paid as follows: Five per cent. of the same at the time of subscribing for said stock, and the balance in installments from time to time, as the same shall be ordered by vote of the stockholders.

Article Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject is five hundred thousand dollars.

Article Seventh. The number and amount of shares, in the capital stock of the said corporation is ten thousand shares of one hundred dollars each.

That afterwards, and on the first day of September, A. D. 1880, at a regular meeting of the board of directors of said the Minneapolis Street Railway Company, the said amended articles of incorporation of said company, were duly adopted by a resolution duly passed thereat.

In witness whereof, the undersigned, the present stockholders and owning all the stock of said the Minneapolis Street Railway Company, being also the directors thereof and the undersigned Thomas Lowry, being the president, and the undersigned C. G. Goodrich, Jr., being the secretary of said company, have hereunto
64 set our hands and seals, this thirteenth day of September, A. D. 1880.

THOMAS LOWRY, [SEAL.]
President Minneapolis Street Railway Company.
C. G. GOODRICH, JR., [SEAL.]
Secretary Minneapolis Street Railway Company.
CLINTON MORRISON. [SEAL.]
W. W. McNAIR. [SEAL.]
JAMES A. LOVEJOY. [SEAL.]
H. M. CARPENTER. [SEAL.]
VOLNEY S. IRISH. [SEAL.]
GEO. A. MORRISON. [SEAL.]
W. W. HERRICK. [SEAL.]

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known, that on this thirteenth day of September, A. D. 1880, there came before me personally Clinton Morrison, W. W. McNair, James A. Lovejoy, H. M. Carpenter, Volney S. Irish, George H. Morrison, and W. W. Herrick, and Thomas Lowry and C. G. Goodrich, Jr., to me known to be the same persons who signed and executed the foregoing certificate and to be the stockholders and directors of

said the Minneapolis Street Railway Company and said Thomas Lowry being known to me to be the president and said C. G. Goodrich, Jr., being known to me to be the secretary of said company, and they each acknowledged that they executed the same
65 freely and voluntarily for the uses and purposes therein expressed, and the said persons being each duly sworn, each for himself says, that he occupies the relation to said corporation above stated, and that the foregoing certificate is true of his own knowledge and is signed, executed and acknowledged pursuant to the authority of the stockholders and directors of said corporation given as therein stated. In witness whereof, I have hereunto set my hand and seal of office.

[NOTARIAL SEAL.] J. A. RANDALL,
Notary, Public, Hennepin County, Minnesota.

Filed Sept. 14, 1880, at 11:30.

FRED VON BAUMBACH,
Secretary of State.

E-462.

A resolution passed by the stockholders of the Minneapolis Street Railway Company at a special meeting duly called and held on the 15th day of February, A. D. 1907, at eleven o'clock A. M. Notice of such meeting having been duly given in writing stating that the purpose of said meeting was to adopt the resolution following, which resolution was offered and unanimously adopted, to-wit:

Resolved, that whereas, this corporation is desirous of, and did attempt, on the 26th day of August, 1886, to renew its articles of incorporation and extend the time of its corporate existence; and

Whereas, the statutes in force regarding such renewal were
66 not complied with, and said effort and intention on the part of this company to so renew its articles was not carried out or fulfilled; and

Whereas, it is now deemed advisable that such renewal should be made.

Now therefore, be it resolved, that the period of continuance of this corporation be and the same is hereby renewed to take effect on the first day of July, A. D. 1923, and to continue for the further period of thirteen years and eight months next thereafter, which resolution being duly seconded and a vote thereon taken, the same was carried unanimously.

There being fifty thousand votes, representing fifty thousand shares of the capital stock of this company, one vote for each share of all of the capital stock of this corporation outstanding in favor thereof, and no votes against, the resolution was offered:

Resolved, that the secretary of this company be and he is hereby authorized and directed to cause a certified original copy of the foregoing resolution, under the corporation seal of this company and a statement of the vote by which the same was adopted, and properly verified, and to cause the same to be properly filed, recorded and

published, as required by law, which resolution being duly seconded, a vote thereon was taken and the same was unanimously carried, all the outstanding stock of the corporation being present voted therefor, and the resolution was thereupon duly declared adopted.

67 We hereby certify that the foregoing resolution was duly adopted at a meeting of the stockholders of the Minneapolis Street Railway Company at the time, place and in the manner above recited.

MINNEAPOLIS STREET RAILWAY COMPANY,
By C. G. GOODRICH, *Vice-President.*
By A. Z. LEVERING, *Secretary.*

[CORPORATE SEAL.]

STATE OF MINNESOTA,
County of Hennepin, ss:

A. Z. Levering, being first duly sworn, upon oath deposes and says, that he is the secretary of the Minneapolis Street Railway Company, and was present at the meeting of said company held on the 15th day of February, 1907, at eleven o'clock A. M. which said meeting was duly called by giving ten days' notice, as provided in the by-laws of said company, stating the purpose and object of said meeting, and that at said meeting the foregoing resolution would be offered for consideration. That there were present at said meeting and represented, either by person or proxy all of the capital stock of said corporation; that the foregoing resolution was offered at said meeting and all of the stock of said corporation was voted in favor of said resolution, and thereupon the same was duly declared carried.

That the foregoing resolution, authorizing the secretary of this company to cause a certified copy of the resolution amending

68 the articles of incorporation be duly made, recorded and published, as required by law, was offered and all the stock of said corporation voted in favor of its passage, and the same was duly declared carried.

That the foregoing is a full, true and correct copy of said resolution as adopted at said meeting.

A. Z. LEVERING.

Subscribed and sworn to before me this 15th day of February, A. D. 1907.

[NOTARIAL SEAL.] F. G. JAMES,
Notary Public, Hennepin Co., Minn.

My commission expires October 9th, 1909.

Filed for record in this office Feb. 18, 1907, at 1:30 P. M.

JULIUS A. SCHMAHL,
Secretary of State.

UNITED STATES OF AMERICA,

STATE OF MINNESOTA,
DEPARTMENT OF STATE.

I, Julius A. Schmahl, Secretary of State of the State of Minnesota, do hereby certify that I have compared the annexed copy with record of the original instruments in my office of Articles of Incorporation of the Minneapolis Street Railway Company, filed Sept. 14, 1880, and recorded in Book E of Incorporations, pages 462; amendment to said articles of incorporation, filed Feb. 18, 1907, and recorded in Book N3 of Incorporations, page 464; and that
69 said copy is a true and correct transcript of said record of said original instruments and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the Great Seal of the State at the Capitol, in Saint Paul, this 7th day of August, A. D. nineteen hundred and seven.

JULIUS A. SCHMAHL,
Secretary of State.

[The Great Seal of the State of Minnesota. 1858.]

70 And on July 1st, 1907, the respondent above named filed its answer to said amended Bill of Complaint, which is in the words and figures following, to-wit:

71 Circuit Court of the United States, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY (a Corporation), Complainant,
vs.
THE CITY OF MINNEAPOLIS (a Municipal Corporation), Respondent.

Respondent's Answer to Complainant's Amended Bill of Complaint.

The answer of the City of Minneapolis, the above named respondent, to the amended bill of complaint of the Minneapolis Street Railway Company, complainant:

This respondent now, and at all times hereafter, saving and reserving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the amended bill of complaint contained, for answer thereto, or to so much thereof as this
72 respondent is advised it is material or necessary for it to make answer to, answering, alleges and states:

I.

That the complainant is not now, and that it has not been, since the 1st day of July, A. D. 1903, a corporation, either as alleged in the complaint or otherwise. That the complainant was organized as a corporation under Title II., Chapter 34, of the Statutes of Minnesota, Revision of 1866, as amended by Chapter 13 of the General

Laws of the State of Minnesota for the year 1873, and not otherwise, and that it commenced the period of its corporate existence on July 1st, A. D. 1873, and that its corporate existence expired, by lapse of time and by virtue of the statutes of the state of Minnesota, on July 1st, 1903, and that under and by virtue of the laws of the state of Minnesota in force at the time of the organization of this complainant, and at all times up to and subsequent to July 1st, 1903, the complainant's corporate existence could not exceed the period or term of thirty (30) years, and that prior to July 2nd, 1903, no attempt had in any manner been made to extend the corporate existence of said complainant, either as provided by law or otherwise, and that on July 1st, 1903, the said complainant ceased to be a corporation and the term of its corporate existence then and thereupon expired and terminated. That Exhibit "A." attached to complainant's amended bill of complaint, is a true and correct copy of the Articles of Incorporation of this complainant. That Exhibits "B" and "C," attached to complainant's amended bill of complaint, are true and correct copies of the said amendments, and respond-
73 ent admits that all of the statutory requirements relating to the adoption of said amendments have been complied with. That the life of complainant's corporate charter has never been extended under or by virtue of the laws of the state of Minnesota, or otherwise, to March 1st, 1937, and that the life of the complainant's charter does not extend to March 1st, 1937, or to any other time, but that its corporate existence expired, as hereinbefore alleged, on July 1st, 1903.

Respondent denies that the complainant was organized for any purpose or with any power of doing any other things than as expressly set forth in its said Articles of Incorporation.

II.

Respondent admits that it is a municipal corporation, organized and existing under and by virtue of the laws of the state of Minnesota, and that it has been such a municipal corporation since long prior to July 1st, 1873; but denies that on July 1st, 1873, or at any time subsequent thereto, it was or has been possessed of any right, power or authority to grant to this complainant, or to any other person or corporation, any contract rights in or to the use of its streets, alleys or public grounds within its corporate limits upon or along which to construct, maintain or operate street railway lines.

Respondent specifically alleges that since its incorporation it has never had any right, power or authority over the use of its streets, alleys and public grounds, except a purely governmental right, power or authority, and that it has never had, and does not now have, any proprietary interest or control over its streets, alleys or public grounds, and that it holds now, and has always held,
74 all of its streets, alleys and public grounds in trust for the use and benefit of all its citizens and residents, and not otherwise, and that it has never exercised, or attempted to exercise, any proprietary interest in said streets, alleys or public grounds, and that it has never made or entered into any contracts, either with this complainant or any other person or party in reference to the use

of its said streets, either as alleged in the amended bill of complaint, or otherwise, and that all of the resolutions and ordinances referred to and set up in the amended bill of complaint herein, were passed by said respondent solely in its governmental capacity, and not in the exercise of any proprietary interest on its own behalf.

Respondent admits that it is, and ever since its organization as a municipal corporation, has been, a citizen of the state of Minnesota, and that it is now an inhabitant of the Fourth Division of the District of Minnesota; but respondent denies that it now has, or has ever had, any power delegated to it from the legislature of the state of Minnesota, to enter into, or to make, or to execute, any contracts whatsoever with this complainant, and specifically alleges that it has never made, entered into, or executed any contract with this complainant, either as alleged or otherwise.

Respondent further denies that this complainant is now operating, or has ever operated, its lines of street railway in the said City of Minneapolis under or by virtue of any contract, duly or otherwise made, entered into or executed by the city of Minneapolis and this complainant.

III.

This respondent admits that this cause is a suit in equity, of a civil nature, and that the matter in dispute and controversy
75 herein, exclusive of interests and costs, or either, exceeds the sum of Five Thousand Dollars ($5,000), but specifically denies that this cause is a suit arising under the constitution of the United States, or that respondent is, or has attempted to enforce against this complainant any law of the state of Minnesota or any ordinance of the City of Minneapolis which does or may in any manner or to any degree impair any contract rights of this complainant.

This respondent further denies that the enforcement of the ordinance of February 9th, 1907, as the same appears in Paragraph X of the amended bill of complaint, will take from this complainant its property, or any part thereof, without due process of law, or that the enforcement of said ordinance will deny to this complainant the equal protection of the law, or that the enforcement and operation of such ordinance will violate Section 1 of Article XIV of the amendments to the Constitution of the United States, or Section 10 of Article I of the Constitution of the United States, either as alleged or otherwise.

IV.

Respondent admits that the Common Council of Minneapolis did, on the 9th day of July, A. D. 1875, pass a certain ordinance entitled, "An ordinance authorizing and regulating street railways in the City of Minneapolis," as set forth in Paragraph IV of complainant's bill of complaint, but denies that the said Common Council of the City of Minneapolis was authorized, by its charter or by the laws of the State of Minnesota, to pass said ordinance except in its strictly governmental capacity and in the exercise of its purely governmental functions.

76 Respondent admits that said ordinance was duly published on the 24th day of July, 1875, and that it was thereafter, and on the 18th day of August, 1875, accepted in writing by this complainant, but denies that the said ordinance and its said acceptance ever made or constituted a contract between this respondent and the said complainant.

V.

Respondent admits that the Common Council of the City of Minneapolis passed the ordinance and the amendment thereto, set up in Paragraph V of the amended bill of complaint.

VI.

Respondent also admits that the legislature of the State of Minnesota, on the 4th day of March, 1879, passed Chapter 299 of the Special Laws for that year, and that said special act is correctly set forth in Paragraph VI of the amended bill of complaint.

VII.

Respondent admits the allegations of Paragraph VII of the amended bill of complaint so far as the same relates to the building of street railway lines within the corporate limits of the City of Minneapolis, but denies that it ever had, or ever assumed to have, anything to do with the building of any suburban lines of railway, either as alleged in the amended bill of complaint or otherwise.

Respondent admits the passage of the resolutions and ordinances set out in Paragraph VIII of the amended bill of complaint, but alleges that all of the resolutions in said paragraph set out,
77 were passed by the Common Council of the City of Minneapolis at the urgent request of said complainant, and that each and all of said resolutions were prepared by and at the instance of this complainant and for the purpose of aiding the complainant in making its experiments with reference to the use of cable power and electricity in the propulsion of street cars, and that, after said experiments had been made by said complainant, and on the 19th day of September, 1890, the said City Council of the City of Minneapolis passed that certain ordinance set forth in full in said Paragraph VIII of the amended bill of complaint, and that said complainant duly accepted said ordinance, in writing, and from the 19th day of September, 1890, up to the present time, has constructed, maintained and operated its electric street railway lines in said City of Minneapolis under and by virtue of said ordinances and resolutions and not otherwise, and that since the 19th day of September, 1890, the said complainant has had no right, power, or authority to construct, maintain or operate its street railway lines upon any of the streets of the City of Minneapolis by the use of electricity, except under and by virtue of the provisions of said ordinance of September 19, 1890, and that since on or about the 19th day of September, 1890, the said complainant has operated all of its street railway cars in, upon and along the streets of this respondent by

the use of electricity, and not otherwise, and that it is now, and at the time of the bringing of this bill, was, operating all of its street railway lines in said City of Minneapolis solely by the use of electricity, and that since the 19th day of September, A. D. 1890, it has not constructed, maintained or operated, within the City of Minneapolis, any horse street railway lines, and that on or
78 about the 19th day of September, 1890, it wholly abandoned the operation of its street railway lines in said City of Minneapolis by animal power.

Respondent further alleges in this connection that on July 9th, 1875, and up to and for some time subsequent to the 4th day of March, A. D. 1879, the territory constituting the City of Minneapolis did not exceed eleven and one-fourth (11¼) square miles in area, and that on July 9th, 1875, the population of said City of Minneapolis did not exceed thirty-four thousand (34,000) people, and that on and for some time subsequent to March 4th, 1879, the population of said City of Minneapolis did not exceed forty-seven thousand (47,000) people, and that on and for more than two (2) years prior to September 19th, 1890, the territory included in and constituting the City of Minneapolis embraced, and has ever since embraced, more than fifty-two (52) square miles in area, and that the population of the City of Minneapolis, on September 19th, 1890, was more than one hundred sixty-four thousand (164,000) people, and that at the time of the passage of the said ordinance of February 9th, 1907, and at the time of the bringing of this action, the population of the City of Minneapolis was about three hundred thousand (300,000) people.

Respondent further alleges that on September 19th, 1890, and for a long time prior thereto, the said horse street railway lines of this complainant in said City of Minneapolis were wholly inadequate to the demands and needs of the people of the said City of Minneapolis, and that various persons, parties and corporations were then seeking to obtain permits from the said City of Minneapolis, to con-
struct, maintain and operate electric street railway lines along
79 and upon the streets of the said city, and that the said City of Minneapolis passed said ordinance of September 19th, 1890, and the said complainant accepted said ordinance as a complete and independent permit to construct, maintain and operate electric street railway lines in, along and upon the streets of the said City of Minneapolis.

This respondent specifically denies that the said complainant constructed, maintained or operated its electric lines of street railway in said City of Minneapolis in reliance upon any supposed right under said ordinance of July 9th, 1875, to charge five (5) cents for each passenger riding upon its said lines, and alleges that the said complainant accepted and consented to all of said ordinance of September 19th, 1890, and by its acceptance of and consent to, said ordinance, agreed that this respondent should, at all times, have and reserve to itself the right to regulate, reduce or otherwise change the rate of fare to be charged by complainant to passengers upon its said electric street railway lines.

That the City of Minneapolis, on the 14th day of July, A. D.

1893, duly passed an ordinance, a copy of which is hereto attached and marked Exhibit "A," and made a part of this answer; that complainant refused and neglected to comply with the provisions of said ordinance, and afterwards, on or about the 11th day of November, A. D. 1893, respondent commenced a proceeding by mandamus in the district court of Hennepin county against this complainant, to enforce and compel the observance of said ordinance by complainant; that issues in said action were duly joined and said action was tried before the Honorable Seagrave Smith, one of the judges of said court, and his findings of fact, conclusions of
80 law, and memorandum attached thereto, were made and filed therein, a copy of which complaint, answer, findings of fact and conclusions of law, and memorandum are hereto attached and marked respectively, Exhibits "B," "C" and "D," and made a part of this answer; that thereafter a stipulation dismissing said case was made and filed, a copy of which is hereto attached and marked Exhibit "E" and made a part of this answer, that no judgment was ever entered in said action, but that after the decision thereof by the court, this complainant put into effect said ordinance and consented to the provisions thereof, and has ever since complied with the same.

VIII.

Respondent admits and alleges that it now claims, and ever since the passage of the ordinance of the 19th day of September, 1890, has claimed, that it has the absolute right to regulate, control, reduce or otherwise change the amount or rate of fare to be charged by this complainant for each passenger riding upon its electric street railway lines, and that it has such absolute right, power and authority to reduce such amount or rate of fare below five (5) cents, and that it has such right, power and authority to so regulate, control, reduce or otherwise change such amount or rate of fare, without this complainant's consent, and that such right, power or authority is fully delegated to it from the legislature of the State of Minnesota by its charter, and also reserved to it by the express terms of the said ordinance of September 19th, 1890.

Respondent admits that it passed said ordinance of February 9th, 1907, as the same is set out in Paragraph X of the amended
81 bill of complaint, and alleges that it passed the same in the due exercise by it of its general police powers and the said powers conferred upon it by its charter, and the powers expressly reserved to it by the said ordinance of September 19th, 1890, and further admits that it intends to enforce against this complainant, said ordinance, but denies that it has intended, or now intends, to enforce the same, by various means or by various actions or by a multiplicity of suits, or by instituting any criminal proceedings, but that it has always intended, and still intends, to enforce the provisions of said ordinance, unless enjoined by this court by an action of mandamus against said complainant.

Respondent further alleges that said ordinance was duly passed by its Common Council on the 9th day of February, A. D. 1907, and thereafter, and on the 18th day of February, 1907, duly approved and signed by its mayor, and that as a part of the passage of

said ordinance, as required by its charter, the same must be published before taking effect, and that, under the charter of this respondent, no ordinance of its Common Council is complete or of any force or effect until the same has been published, and that the publication of an ordinance is made, by its charter, a necessary and legislative part of the passage of any ordinance, and that the publication of an ordinance is as much a part of its passage as the voting thereon by the members of its Common Council and the approval thereof by the mayor of the city, and that each and every one of said acts, to-wit: the passage by the Common Council, the approval by the mayor, and the publication thereof, are necessary parts of the legislative act of passing an ordinance of the City of Minneapolis.

IX.

Respondent specifically denies that unless an injunction is
82 ordered in this action against the publication of said ordinance, or against its enforcement, a multiplicity of suits would ensue, or that any suits (except the one action of mandamus, which, in case of non-compliance with said ordinance by the complainant, this respondent would bring against it) would be brought, or that great, or any, inconvenience, or any conflict or trouble would arise from the refusal of this complainant to recognize the validity of said ordinance, except only the testing of the validity of said ordinance by an action brought by this respondent against said complainant to compel compliance therewith.

Respondent denies that it, or any of its officers or employees, have intended, or intend, to enforce said ordinance by taking steps or measures to forfeit, or to attempt to forfeit, the alleged charter, franchises or privileges owned by this complainant, or to institute any suits or proceedings against this complainant, its officers, conductors, or agents, with the design of putting such ordinance into operation and effect, or of compelling this complaintant, its officers, conductors or agents to accept less than five (5) cents fare, or to sell tickets at the rate of six (6) for twenty-five (25) cents, except only that this respondent would, in case complainant fails to comply with said ordinance, institute said action of mandamus against it to compel compliance therewith.

Respondent also denies that either it, its officers, employees or representatives have intended, or intend, to make any complaints or charges against said complainant for alleged violation of said ordinance, or to prosecute or institute any proceedings against it to forfeit its alleged charter, franchises or privileges, or to
83 annul its corporate existence.

Respondent further denies that any attempted enforcement of said ordinance would result in any personal altercations between passengers and conductors, or in any breaches of the public peace, or in arrests or probable disturbance, or that this complainant would suffer either great or permanent, or any loss of business or good will, on account of said ordinance.

This respondent, in this connection, further alleges that it would attempt to enforce said ordinance in precisely the same way it enforced compliance with the ordinance of July 14th, 1893, to-wit:

by an action of mandamus in its own name against this complainant, in the district court of Hennepin county, Minnesota, and that in the case of said ordinance of July 14th, 1893, no injunction was ordered against its enforcement, and that there was not a multiplicity of suits, no arrests, no personal altercations or conflicts, no proceedings to forfeit complainant's alleged charter or franchise on privileges, but that the whole question of the validity of said ordinance was, without any disturbance or altercations or the institution of any other suits or proceedings of any nature, civil or criminal, peaceably settled in said action of mandamus.

Respondent denies each and all of the allegations contained in Paragraph XI of the amended bill of complaint with reference to a multiplicity of suits or the institution of various actions or proceedings on behalf of the respondent, its officers, employees or representatives, or its citizens, and with reference to personal conflicts or altercations between passengers and conductors, and breaches of the peace, and arrests, and disturbances, and the alleged
84 loss of business and good will on the part of the complainant; and alleges that each and all of said allegations are made for the sole purpose of conferring jurisdiction upon this court, and not otherwise.

X.

Respondent specifically denies that the only power or authority which it has or, at the date of the passage of said ordinance of February 9th, 1907, had, with reference to regulating the rates to be charged by this complainant upon its electric street railway lines in said City of Minneapolis, was conferred by the said ordinance of July 9th, 1875, and its subsequent ratification by the state legislature of 1879; and alleges that any limitation whatever upon its powers or authority to regulate or control the rates of this complainant, contained in said ordinance of July 9th, 1875, as confirmed by the said Special Act of the Legislature for the year 1879, was confined to complainant's old horse street railway, and never applied to complainant's electric street railway in said City of Minneapolis, and that as to said complainant's electric street railway in said City of Minneapolis, and all of it, said respondent now has, and since the passage of the ordinance of September 19th, 1890, has had, full and complete power and authority to regulate, control, reduce or otherwise change the rate of fare to be charged by said complainant upon its electric street railway lines in said City of Minneapolis.

XI.

Respondent specifically denies that complainant has any vested property right in the streets of the City of Minneapolis, or any of the same, for the purpose of constructing, maintaining or
85 operating any electric street railway lines under the ordinance of July 9th, 1875, or that it has any vested right under said ordinance to charge or collect a fare of five (5) cents, or any other fixed sum, for riding upon its electric street railway cars within the said City of Minneapolis.

Respondent specifically denies that the enforcement of said ordinance of February 9th, 1907, against this complainant, or against any of its officers or agents, will involve any direct, immediate or irreparable injury to this complainant, or to its alleged vested property rights.

Respondent denies that the adoption of said ordinance of February 9th, 1907, and any enforcement of the same against this company would be in violation of the Constitution of the United States, or of Section 10 of Article 1 thereof, or of Article XIV thereof, either as alleged in said amended bill of complaint or otherwise.

XII.

Respondent specifically alleges that the resolutions passed April 5th, 1907, and approved April 11th, 1907, set out in full in Paragraph VIII of the amended bill of complaint, were passed by the said Common Council of this respondent, at the request of this complainant, and that each of said resolutions were prepared by this complainant and presented to said council for passage, and that the concluding sentences of each of said resolutions, as follows, to-wit: "As provided in Section 3 of that certain ordinance passed by the council on July 9th, 1875," and "As provided in Section 3 of an ordinance passed July 9th, 1875," were inserted by this complainant, and that said resolutions, and each of them, were
86 prepared by this complainant long after the institution of this action, and that these are the only resolutions passed by the City Council of this respondent since the passage of the ordinance of September 19th, 1890, in which, any such or similar reference to the ordinance of July 9th, 1875, has been made, and that these provisions in each of said resolutions were inserted by this complainant for the purpose of connecting, in some manner, the present action of the said City Council with the provisions of said ordinance of July 9th, 1875.

Respondent further alleges that neither the City Council of said City of Minneapolis, nor its attorney, noticed or had called to their or his attention, these provisions so inserted by the complainant in said resolutions passed April 5th, 1907, and approved April 11th, 1907.

XIII.

Further answering said amended bill of complainant, respondent alleges and states that on July 9th, 1875 (the date of the passage of said ordinance mentioned and described in Paragraph IV of said amended bill of complaint) and until July 3rd and 8th, 1878, (the dates respectively of the passage of said two Ordinances mentioned in Paragraph V. of said Amended Bill of complaint), and until the 4th day of March, 1879, (the date of the approval of Chapter 299 of the Special Laws of Minnesota for the year 1879), and for a considerable time thereafter, the territory constituting the then City of Minneapolis was, and did not exceed eleven and one-fourth (11¼) square miles in area; that on September 19th, 1890, the territory included in and constituting the City of Minneapolis, was, and ever since

87 has been, about fifty-two (52) square miles in area; that the territory embraced in said city in 1875, in 1878, and in 1879, was only about one-fifth (1-5) of the territory now, and in the year 1890, embraced in and constituting said city; that the lines of street railway of complainant extend in all directions through and from the central part of said city and far beyond the original boundary lines of said city as they existed in the years 1875, 1878 and 1879; that the rights and authority of said complainant to construct, maintain and operate electric street railway lines in said City of Minneapolis are only those expressly conferred upon it by said electric ordinance of September 19, 1890, and the several ordinances amendatory thereof, and the ordinances hereinbefore expressly referred to and set forth in the amended bill of complaint, and the various resolutions, motions and reports of committees relative thereto, passed and adopted by the City Council of respondent at various times subsequent to the passage of said electric ordinance of September 19th, 1890; and the respondent further alleges that the population of Minneapolis, at the following dates, was and is as set forth opposite each date, to-wit:

Year.	Population.
1870	18,079
1875	33,700
1880	46,887
1885	130,737
1890	164,738
1895	193,835
1900	202,718
1905	261,974

XIV.

Further answering said amended bill of complaint, respondent alleges and states that on September 27th, 1889, the City
88 Council of respondent duly passed an ordinance authorizing complainant to construct tracks and operate an electric railway on University avenue and certain other streets in said city; that said ordinance was approved October 3rd, 1889, and was published in the official paper of said city on October 4th, 1889, and that a true and correct copy of said ordinance is in words and figures as follows:

"The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company, its successors and assigns, are hereby authorized to construct and maintain a double line of its street railway with tracks of standard gauge upon and over the following named streets and avenues in the City of Minneapolis, viz: Commencing on University avenue at the city limits; thence on said University avenue to Cambridge street; thence on Cambridge street to Washington avenue; thence on Washington avenue to Fifteenth avenue south; thence on Fifteenth avenue south to Third street; thence on Third street to First avenue south, with all

turnouts, switches, turn-tables and other appurtenances which may be necessary and convenient, and to operate the same by electricity as a motive power, and erect and maintain upon and along said streets and avenues such poles, wires or other appliances as may be necessary to operate said line by electricity, under the supervision and approval of the City Engineer; provided, however, that on University avenue from the city limits to Cambridge street the poles shall be erected in the center of the street with cross trees
89 placed thereon, from which the wires shall be suspended.

SEC. 2. The said line shall be constructed and in operation on or before July first (1st), 1890.

SEC. 3. This ordinance is granted upon the express condition and requirement that the said Minneapolis Street Railway Company shall pay to the City Treasurer of the City of Minneapolis on the first Monday of January of each year after said line is constructed, an annual tax or license fee of twenty-five dollars per car for the average number of cars operated by it on said line or on any portion thereof during the next preceding year.

SEC. 4. In the construction, maintenance and operation of said line of railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances now in force or hereafter adopted of said city, as far as applicable, and shall also be subject to all the provisions of a resolution passed by the City Council of the City of Minneapolis, July 19th, 1889, and approved July 26th, 1889, so far as the same is applicable.

SEC. 5. This ordinance shall take effect and be in force from and after its publication."

And respondent further alleges and states that on June
90 27th, 1890, the City Council of respondent duly passed an ordinance authorizing complainant to lay and use a "T" rail on University avenue southeast, in the operation of its railway lines on said avenue; that said ordinance was approved by the mayor July 2d, 1890, and was published in the official paper of said city on July 5th, 1890, and that a true and correct copy of said ordinance is in words and figures as follows:

"The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company is hereby authorized to lay and use a 'T' rail (so-called) of not less weight than forty-five (45) pounds to the yard, on University avenue southeast from Cambridge street to the east city limits, in the City of Minneapolis, in its operation of its line of street railway on said University avenue, as provided in that certain ordinance of the City of Minneapolis entitled 'An Ordinance authorizing the Minneapolis Street Railway Company to construct its tracks and op-

erate an electric railway on streets herein named,' approved October 3d, 1889, and as hereinafter provided, to-wit:

First. That said railway company shall boulevard a space twenty-five (25) feet in width, the center line of which space shall be the center line of said University avenue, and shall sod said space on the outside of and between the tracks and rails of said company, and shall for such time as the City Council permits the boulevard maintain and keep the same in good condition, the same as other parks are kept, and shall plank all the street crossings of said Uni-
91 versity avenue in a proper manner at the time of laying the tracks thereon, and shall thereafter keep the crossings in good condition for the crossing of ordinary vehicles and shall shape the roadways on each side of said boulevard in such manner as the city engineer shall direct.

Second. Whenever it is deemed necessary by the City Council of the City of Minneapolis to pave and otherwise improve the said University avenue the said railway company shall put in curbing, of the same kind used by the city on said University avenue, on the outer lines of said boulevard, and shall pave said crossings with the same kind of pavement used in the pavement of University avenue and shall thereafter keep the same in as good condition as the rest of said avenue.

SEC. 2. When said boulevard shall have been constructed as herein provided, it shall be unlawful for any person or persons, not engaged in the maintenance of said boulevard and railroad, to ride, drive or walk over said boulevard, in such manner as to interfere with the keeping of the same in proper condition, and the same rules governing the protection of other boulevards and parks in said city shall be applied to the same.

SEC. 3. Before this ordinance shall be of any force or effect, the said railway company shall accept the same by filing with the city clerk of said city its written acceptance thereof, agreeing to carry out all the matter and things herein contained.

SEC. 4. This ordinance shall take effect and be in force
92 from and after its publication and acceptance by said company, as provided in section three of this ordinance."

And respondent further alleges and states that on April 8th, 1892, the City Council of respondent duly passed an ordinance requiring complainant to issue transfer checks on its street railway lines in the City of Minneapolis and provided penalties for its failure so to do; that said ordinance was approved by the mayor of said city on April 11th, 1892, and was published in the official paper of said city on April 14th, 1892, and that a true and correct copy of said ordinance is in words and figures as follows, to-wit:

"The City Council of the City of Minneapolis do ordain as follows:

Section 1. Said street railway company shall issue transfer checks at the junction of its street railway lines in said city at Washington and Hennepin avenues in said city to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on either

of said connecting lines; provided, that no passenger shall be entitled to more than one transfer check for one fare; and provided further, that such transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used upon the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin
93 avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues. And such transfer check shall be issued and given to travelers on all lines of said street railway company in the City of Minneapolis at all junctions and intersections made by said lines of railway, in the said city, as the same now exist or hereafter may be established; which transfer check shall so entitle a passenger to a continuous passage on the line so intersected or connected with.

SEC. 2. Said street railway company shall forfeit to the City of Minneapolis the sum of fifty dollars ($50.00) for each time it refuses so to issue a transfer check, and for each time it refuses to honor the same, by carrying any passenger so entitled thereto, on any such connecting line.

The penalties herein provided for may be recovered in a civil action or actions brought by said city against said street railway company, in the municipal court of the City of Minneapolis.

SEC. 3. This act shall take effect and be in force from and after its publication.

And respondent further alleges that on June 30th, 1899, the City Council of respondent duly passed an ordinance authorizing complainant to operate through cars from the central portion of the City of Minneapolis to the eastern limits thereof; that said ordinance was passed over the mayor's veto on July 14th, 1899, and was published in the official paper of said city on July 18th, 1899; that each and all of the ordinances hereinbefore set forth in this para-
94 graph, except the ordinance last above set forth, passed on April 8th, 1892, were duly accepted by said complainant and that a true and correct copy of said last named ordinance is in words and figures as follows:

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. There is hereby granted to the Minneapolis Street Railway Company, its successors and assigns, the authority, right and privilege to operate through interurban cars to and from the central business portion of the City of Minneapolis to the eastern city limits of said avenue intersect, in the City of Minneapolis, and the eastern city limits of said city. Said through interurban cars shall be conspicuously painted and labeled so that they may be readily distinguished from all other cars operated over the lines of said Minneapolis Street Railway Company, and shall be operated by said Minneapolis Street Railway Company, its successors and assigns, over and along its tracks on Hennepin avenue, Sixth street, First avenue south, Washington avenue, and University avenue, at a rate of speed that is not unsafe and unreasonably high.

SECTION 2. Said Minneapolis Street Railway Company, its successors and assigns, shall have the authority and right to charge and collect fifteen cents for each passenger, or person, riding to or from any point in the City of Minneapolis, to or from any point in the City of St. Paul, on said through interurban cars; provided, that no more than five cents shall be charged and collected as
95 fare between the central business portion of the city, and Oak street southeast. Provided, however, that said Minneapolis Street Railway Company, its successors and assigns, shall receive and accept a transfer issued by it pursuant to any provision or provisions of the ordinance of the City of Minneapolis now in force, relative to transfers, as and for five cents on account of such fifteen cent fare; and shall also issue a transfer to any passenger or person riding on said through interurban cars, who has paid one full fare of fifteen cents, as herein provided, which said transfer shall entitle any person so receiving the same to ride upon any line, or lines, of said Minneapolis Street Railway Company, its successors and assigns, operated within the City of Minneapolis; subject, however, to all the limitations and conditions now existing relative to the issuance and use of transfers provided for in ordinances now in force in the City of Minneapolis, relative to street railway lines.

SEC. 3. The right herein granted to operate through interurban cars, and to receive and collect fifteen cents for passengers riding thereon, shall cease and terminate at the expiration of three years from the passage of this ordinance, unless further extended by the City Council of the City of Minneapolis.

SEC. 4. Said Minneapolis Street Railway Company, its successors and assigns, shall continue to operate local interurban cars to and from the business portion of the City of Minneapolis to the business portion of the City of St. Paul, over the route specified in
96 this ordinance; provided, that said Minneapolis Street Railway Company shall maintain in said local interurban service cars as large, convenient and well equipped, as those now in operation on said line, sufficient to reasonably accommodate the traveling public, such local interurban cars to be operated at intervals not exceeding ten minutes apart. Said Minneapolis Street Railway Company, its successors and assigns, shall stop such local interurban cars for the purpose of taking on and letting off passengers at all cross streets at which it is now incumbent upon said company to stop its interurban cars for the purpose of receiving and discharging passengers, as well as at all other cross streets which the City Council of the City of Minneapolis may hereafter designate; and provided, further, that said local interurban cars shall be so operated as to make the trip between the terminus of said line in the City of Minneapolis and the terminus of said line in the City of St. Paul within a period of one hour; provided, however, that in case the City Council of the City of Minneapolis shall require such number of additional stops to be made hereafter as shall necessarily increase the time required to make such trip, the time thus added by such additional stops may be added to the said one hour's time for said trip. And provided, further, that said Minneapolis Street Railway Company, its success-

ors and assigns, shall cause all cars operated on the above mentioned line, either through or local, to come to a full stop at the street crossing at Oak street and University avenue southeast, and take
97 on and let off passengers.

SEC. 5. Said Minneapolis Street Railway Company shall have the right to avail itself of the terms and provisions of this ordinance by accepting the same in writing and agreeing to all the terms and provisions hereof, which said acceptance shall be made within thirty (30) days from and after the passage and publication of this ordinance, and shall be in writing, signed by the president and secretary of said company, and filed with the city clerk of the City of Minneapolis; and said acceptance shall be in such form as shall be approved by the city attorney of the City of Minneapolis.

SEC. 6. This ordinance shall take effect and be in force from and after its passage, publication and acceptance, as herein, provided for.

XV.

Respondent further alleges that since this complainant commenced to use electricity in the propulsion of its street cars in said City of Minneapolis, and since September 19th, 1890, the said respondent has always claimed to have the full right, power and authority to regulate, control, reduce or otherwise change, the rate of fare to be charged by this complainant upon its electric street railway lines in said City of Minneapolis, under its charter powers and under the ordinance of September 19th, 1890, hereinbefore referred to and set forth at length in complainant's amended bill of complaint.

XVI.

Further answering the amended bill of complaint, respondent denies that complainant is entitled to the relief, or any part
98 thereof, or any relief, either as prayed for in complainant's said amended bill of complaint, or otherwise; and that all of the matters and things hereinbefore set forth and alleged, this respondent alleges to be true, and is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

CITY OF MINNEAPOLIS,
By JAMES C. HAYNES, *Mayor.*

FRANK HEALY,
City Attorney, and Attorney and Solicitor for Respondent, City of Minneapolis.
LANCASTER & McGEE,
Of Counsel for Respondent, Minneapolis, Minnesota.

99 EXHIBIT "A."

An Ordinance

Amending an ordinance entitled "An Ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892, and as further amended by an ordinance passed December 23d, 1892, and approved December 29th, 1892.

Whereas, the provisions regulating the transfer of passengers on the lines of the Minneapolis Street Railway Company, as contained in an ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892, and further amended by an ordinance passed December 23rd, 1892, and approved December 29th, 1892, are in their practical operation, oppressive, unreasonable and a burden and hardship on the public. Now, therefore,

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That section six (6) of an ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Com-
100 pany to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892, and as further amended by an ordinance passed December 23d, 1892, and approved December 29th, 1892, be and hereby is amended so as to read as follows: "Passenger cars on said lines shall run between extreme limits on extensions to or near the intersection of Hennepin and Nicollet avenues, without change to passengers traveling thereon; and said street railway company shall deliver, at the junction or intersection of any of its lines within the City of Minneapolis, a transfer to any passengers demanding the same and who shall pay one full fare, which transfer shall entitle the passenger so receiving the same to a continuous passage on the line so intersected, joined or connected with; said transfer shall be issued to said passenger by the conductor or other agent of said company and from and upon the car which said passenger has paid his full fare, provided that no passenger shall be entitled to more than one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on the connecting or intersecting line on which it is to be used; but said company shall not be required to issue transfers for through travel to or from the interurban cars now operated between the

cities of Minneapolis and St. Paul; provided that transfers for local transportation shall be issued to and from interurban cars to all persons using said cars for local travel. All interurban cars
101 shall continue to stop at the same number of crossings as at present and at such other crossings as the Council shall hereafter direct.

If any of the railway lines of said company do not intersect or connect with all the lines of said company in said city, then transfers shall be issued, in the manner hereinbefore set forth, from the cars operated on said non-intersecting and non-connecting lines to such other lines at the point where said cars nearest approach the intersection of Washington and Hennepin avenues in said city.

Open cars of the most approved pattern shall be provided and operated during the summer months on all of the lines.

SECTION 2. This ordinance shall take effect and be in force from and after its publication.

Passed July 14th, 1893.

J. L. KICHLI,
President of the Council.

(Not approved by mayor.)

Passed July 28th, 1893, over mayor's veto.

Attest:

CHAS. F. HANEY,
City Clerk.

STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

I, Chas. F. Haney, city clerk of the City of Minneapolis, in the County of Hennepin, State of Minnesota, do hereby certify that the foregoing ordinance was returned to the City Council by his honor, Wm. H. Eustis, mayor, without his approval, at the regular meeting held July 28th, 1893. I do further certify that at said meeting the said ordinance was passed notwithstanding the objec-
102 tions of his honor, the mayor, by a vote of two-thirds of the members of the Council (18).

Therefore, in accordance with the provisions of section one (1) of chapter three (3) of the charter of said city, said ordinance has become a valid ordinance, and I hereby certify that it has the same force and effect as if approved by said mayor.

In witness whereof, I have hereunto set my hand and affixed the corporate seal of said city this 29th day of July, A. D. 1893.

[SEAL.]

CHAS. F. HANEY,
City Clerk.

103 EXHIBIT "B."

STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

THE STATE OF MINNESOTA on Relation of the CITY OF MINNEAPOLIS, Relator,

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY.

Information.

To the Honorable, the District Court within and for the County of Hennepin:

Your relator, the City of Minneapolis, hereby informs the court:

First. That it is, and at all the dates and times stated herein was, a municipal corporation of this state, duly created by and existing under the laws thereof. And that as such municipal corporation it has the care, supervision and control of all highways, streets, avenues, alleys, public squares and grounds within the limits of said city.

Second. That the Minneapolis Street Railway Company is, and at all the dates and times herein stated was, a corporation of this state, duly created and organized under the laws thereof, with power and authority to construct, maintain and operate street railway lines in said city with the consent and license of said city, and subject to such regulations, terms and conditions as might, or may be, by said city prescribed.

Third. That heretofore, to-wit, between July 15th, 1875,
104 and July 19th, 1889, said Minneapolis Street Railway Company, with the permission, leave and license of said city did construct upon many streets therein lines of passenger street railway, with the necessary tracks and other appliances therefor, and did operate thereon street railway cars, propelled by animal power and not otherwise; and prior to said last mentioned date and the adoption and passage by the City Council of said city of the resolution first hereinafter mentioned said Minneapolis Street Railway Company did not have or claim to have, any right, authority, permission, leave or license to operate any street railway within said city, or to propel any cars thereon, by or with any motive power save and except animal or pneumatic power. And that prior to the adoption by said City Council on July 19th, 1889, of the resolution hereinafter set forth, said Minneapolis Street Railway Company did not have, or claim to have, any right, authority, leave or license from said city or otherwise to operate any lines of railway therein by or with electricity as a motive power, or to erect, construct or maintain along or upon any of the streets, avenues or highways of said city

any poles, wires, conduits or other appliances or appurtenances necessary to be erected, constructed or maintained in the operation of street railways by or with electric power.

Fourth. That heretofore, to-wit, on the 29th day of June, 1889, said City Council, at the request of said Minneapolis Street Railway Company, duly adopted and passed a certain resolution, entitled a "resolution accepting proposition of the street railway company to build a cable line railway," which was thereafter and on the 1st day of July, 1889, duly approved by the mayor of the said
105 city and was thereupon duly published. And thereby said city gave to said Minneapolis Street Railway Company permission and license to construct a cable line, so-called, from Washington avenue or the Union depot in said city, to Thirty-first street south therein, which line if built would have extended from said depot or Washington avenue upon and along First avenue south in said city, and was therefore commonly designated, and was thereafter in the proceedings of said City Council referred to, as the "First Avenue Line." And that pursuant to said resolution said Minneapolis Street Railway Company did upon the passage thereof enter into an agreement with said city agreeing among other things to complete said proposed cable line by July 1st, 1890.

Fifth. That thereafter, to-wit, on the 19th day of July, 1889, the City Council of said city, at the request of said Minneapolis Street Railway Company, duly adopted and passed a certain other resolution entitled "A resolution authorizing the Minneapolis Street Railway company to construct cable and electric railway lines in the City of Minneapolis, and directing the building of new and extended horse-car lines," which was thereafter and on the 20th day of July, 1889, duly approved by the mayor of said city and was thereupon duly published, which resolution was in the words and figures following, to-wit:

Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company is hereby authorized and required to operate in the City of Minneapolis the part of its lines of street railway hereafter designated, by underground cable, in connection with stationary engines, such as are con-
106 structed and operated in street railway service upon what are known as cables lines, and to construct and maintain such cable lines in and upon the streets of the City of Minneapolis hereafter mentioned.

First. A cable line beginning at Twentieth avenue north and Washington avenue, thence south upon Washington avenue to the corner of Washington avenue south and Cedar avenue, which line shall be constructed and put in operation on or before November 1, 1890, and when completed, the said Minneapolis Street Railway Company shall operate in connection therewith the following horse car lines, viz.:

The line on Washington avenue from Twentieth avenue north to its terminus.

The line from Washington avenue on Twentieth avenue north to Penn avenue, thence on Penn avenue to its terminus.

The line from Washington avenue on Twentieth avenue north to Emerson avenue; thence north on Emerson avenue to Thirty-second avenue north.

The Riverside line and the line across Washington avenue bridge along Cambridge street.

Second. A cable line beginning at the corner of Bloomington avenue and Thirty-second street south; thence north on Bloomington avenue to Franklin avenue; thence on Franklin avenue to Eighth avenue south; thence on Eighth avenue south to Fourth street; thence on Fourth street to First avenue south; thence on First avenue south to the Union depot at High street, which line shall be built and put in operation on or before November 1, 1891, and when said
107 line shall be completed the following horse car lines shall be operated in connection therewith, viz:

A line on Thirteenth avenue south, from Twenty-ninth street south to Franklin avenue, which line shall be completed and in operation on or before November 1, 1891.

The line on Eighth avenue south and Franklin avenue to its terminus.

Third. A cable line from the intersection of Lyndale and Hennepin avenues on Hennepin avenue across the bridge; thence on Central avenue to Sixth street; thence on Sixth street to Third avenue southeast; thence on Third avenue southeast to Harrison street; thence on Harrison street to Twenty-ninth avenue northeast, which line shall be completed and put in operation on or before November 1, 1891, and when constructed and put in operation, all the East Side horse car lines, and on the West Side the Lyndale and Douglass avenue horse car lines shall be operated in connection with this line, unless the City Council otherwise orders.

Said cable lines shall be constructed with double tracks and shall be constructed on the most improved plan and of the best materials. The cars to be used on said lines shall be constructed and maintained with all of the latest improvements for the comfort and convenience of passengers, and shall be used for no other purpose than for the transportation of passengers.

Said cable lines shall be constructed of "standard gauge,"
108 and the rail used shall be what is known as the "Providence girder rail."

The slot or opening in the slot-rail shall not exceed five-eighths of an inch unless by permission of the Common Council.

No cable line shall be speeded at less than eight miles an hour and at such accelerated speed as the City Council may direct; and

Be it further resolved, That the City Council may designate one of the present street railway lines upon which said Minneapolis Street Railway Company shall experiment with electricity as a motive power, which experimental line shall be put in operation by said company not later than six months after such line has been designated, and when electricity, applied in any form upon such experimental line, shall have proved a practical success, then the said Minneapolis Street Railway Company may, and when ordered to do so by the City Council shall, thereafter operate electric lines with

the power applied in the manner which has proved a practical success on such experimental line upon such existing horse car lines, as the City Council may designate as suitable for electric street railways.

Be it further resolved, That it be and is hereby determined that the public necessities demand the street railway extensions and the new lines hereinafter named, and that therefore the Minneapolis Street Railway Company be, and it is hereby required to construct and operate such extensions and new lines within the time hereafter stated, to-wit:

109 A horse car line on Penn avenue, from Crystal Lake avenue to Thirtieth avenue north, which line shall be completed on or before November 1, 1890.

A horse car line on Emerson avenue from Twentieth avenue north to Thirty-second avenue north, to be completed on or before November 1, 1890.

To continue their Hawthorne avenue line across Laurel avenue to Cedar Lake road, in case Laurel is first opened and bridged across the tracks of the St. Paul, Minneapolis & Manitoba and the Minneapolis & St. Louis railroads, and in case Ontario avenue is first opened and bridged, then across Ontario avenue bridge to Irving avenue; thence on Irving avenue to Erie avenue, and on Erie avenue to Newton avenue. Said lines to be put in operation within six months after the completion of such bridge to be operated with cars similar to those on the University avenue line.

The horse car line on Cedar avenue shall be extended to Thirty-seventh street as soon as the street shall be properly graded, and shall then be operated in connection with the Bloomington and Franklin avenue cable line or the Washington cable line, as the Council may decide.

A horse car line on Plymouth avenue, from Washington avenue to Girard avenue, which line shall be constructed and put in operation on or before November 1, 1890.

110 The Sixth street horse car line, which is now operated up Eighth avenue south, when the Eighth avenue cable line shall be completed shall be continued down Sixth street to Ninth avenue south; thence on Ninth avenue south from Sixth street to Seventh street; thence on Seventh street to Cedar avenue; thence on Cedar avenue to Minnehaha avenue; thence on Minnehaha avenue to Franklin avenue; thence on Franklin avenue to the Franklin avenue bridge.

Be it further resolved, That if the operation of said experimental railway line by electricity shall prove a practical success, said company is hereby authorized and required to construct and operate an electric street railway line beginning at Twenty-seventh avenue northeast and Sixth street northeast; thence down Sixth street northeast to Seventeenth avenue northeast; thence on Seventeenth avenue northeast to Adams street; thence south on Adams street to Central avenue.

And also provided, Such experimental electric line shall prove a practical success, said railway company is authorized and required to construct and operate an electric line beginning at Thirty-fourth

avenue north and Penn avenue; thence south on Penn avenue to Crystal Lake avenue; thence on Crystal Lake avenue to Twentieth avenue north; thence on Twentieth avenue north to Washington avenue, said lines to be constructed and put in operation within one year from the time such experimental line shall have proved a practical success, and

Be it further resolved, That said Minneapolis Street Rail-
111 way Company, if it accepts the provisions of these resolutions, shall pay to the City of Minneapolis an annual tax or license fee of $25 per car for each and every car hereafter operated by it in said city, by either cable or electric power, to be paid on the first day of January of each year for the cars operated during the year previous.

And be it further resolved, That if the said Minneapolis Street Railway Company shall accept the provisions of these resolutions, it shall, as soon as the proposed cable lines upon Washington avenue and First avenue south shall have been completed and are in operation, issue transfer checks to any passenger on any of its connecting lines who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on any connecting line, provided that no passenger shall be entitled to more than one transfer check for one fare, and provided further that said transfer check shall be used only by the person receiving the same for a continuous passage and shall be used upon the next car departing on the connecting line upon which it is to be used.

Be it further resolved, That the rights and privileges hereby granted are upon the condition that the Minneapolis Street Railway Company shall, within ten days from the publication of these resolutions, file with the city clerk of the City of Minneapolis its written acceptance of the provisions of these resolutions, accompanied by its bond in the sum of $225,000, with good and sufficient
112 sureties, to be approved by the City Council, and conditioned, that if said street railway company shall neglect or fail to complete said cable lines, or either of them, or said experimental electric line within the time specified in these resolutions for the construction of such lines, it will forfeit to the City of Minneapolis $100,000 for each of said cable lines not built as hereinbefore provided, and $25,000 in case of default in constructing and operating said experimental electric line as herein provided.

Be it further resolved, That all the provisions, conditions and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," and all other ordinances of said city, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines, when not modified by the terms of this ordinance, except where by the conditions of said ordinance the said Minneapolis Street Railway Company is required to pave the street between its rails, it shall also pave that part of the streets on its lines operated by cable and electric power, between the tracks.

It being further understood that nothing in these resolutions con-

tained shall be considered as granting to said Minneapolis Street Railway Company any exclusive privilege or franchise not heretofore possessed by it.

That thereafter, and on August 1st, 1889, the board of
113 directors of said Minneapolis Street Railway Company duly convened for that purpose, determined and declared it to be for the best interest of said company to accept the conditions of said resolutions last above set forth, and did thereupon accept the provisions and conditions thereof, and authorized the president of said company to sign an acceptance in writing of the provisions and conditions of said resolutions for and on behalf of said company and to affix the corporate seal of said company to such acceptance for and on behalf of said company and to file the same with the city clerk of said city.

And, thereupon, and within ten days from the publication of the resolution of said City Council above set forth, said Minneapolis Street Railway Company by its president duly filed with the city clerk of said city its written acceptance of the conditions thereof, which acceptance was in words and figures following, to-wit:

STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

Whereas, The City Council of the City of Minneapolis, on the 19th day of July, 1889, passed certain resolutions entitled "Resolution authorizing the Minneapolis Street Railway Company to construct cable and electric railway lines in the City of Minneapolis, and directing the building of new and extended horse car lines"; approved by the mayor of said city on the 26th day of July, 1889, and published in the official paper of said city on the 27th day of July, 1889, and

Whereas, at a meeting of the board of directors of the Min-
114 neapolis Street Railway Company, held on the first day of August, A. D. 1889, it was resolved by said company to accept the provisions of said resolutions, and that an acceptance in writing signed by the president of said company and under its corporate seal, be filed with the city clerk of said city in accordance with the terms of said resolutions, and a bond of said company in accordance with the provisions of said resolutions be also executed and filed;

Now, therefore, the said Minneapolis Street Railway Company has accepted and does hereby accept the provisions of said resolutions passed by the City Council of the City of Minneapolis as aforesaid and has also executed and herewith tenders for approval of said Council and to be filed with said city clerk, its bond with good and sufficient sureties in the sum of Two Hundred and Twenty-five Thousand Dollars ($225,000.00) conditioned as in said resolutions provided.

In witness whereof, the president of said Minneapolis Street Rail-

way Company has signed the acceptance and affixed the corporate seal of said company, this first day of August, A. D. 1889.

THE MINNEAPOLIS STREET
RAILWAY COMPANY,
By THOMAS LOWRY, *President.*

[Seal of Minneapolis Street Railway Company.]

And that accompanying said acceptance and filed therewith was a bond in the sum of $225,000 with sureties approved by said
115 City Council and conditioned according to the requirements of said resolution.

Sixth. That the construction of the cable lines authorized and required by said City Council by the resolutions aforesaid, and so agreed to be constructed and operated by said Minneapolis Street Railway Company, involved and necessitated the outlay and expenditure by it of an immense sum of money largely exceeding in amount the entire cost of the construction and maintenance of all such poles, wires, conduits and other appliances and appurtenances necessary to be constructed and used in the operation with electricity as a motive power of all the lines of street railway within said city, including lines upon the streets and avenues and parts thereof whereon said Minneapolis Street Railway Company was by resolutions aforesaid authorized and required, and whereon said company agreed, to construct and maintain cable lines, as aforesaid, and that the cost of operating said electric lines when so constructed was known to be and is in fact much less than the cost of operating the same lines by animal or pneumatic power or by underground cables. And by reason thereof said Minneapolis Street Railway Company by and through its president did on the 11th day of January, 1890, address and present to said City Council a communication in writing in the words and figures following, to-wit:

MINNEAPOLIS, *Jan. 10th,* 1890.

To the Honorable Mayor and City Council of the City of Minneolis:

GENTLEMEN: In compliance with an ordinance of the City Council, passed July 19th, 1889, the Minneapolis Street Railway Company proceeded at once to let contracts for a cable road on
116 Washington avenue, from Twentieth avenue to Cedar avenue; thence on Cedar avenue to Riverside; thence on Riverside to Twenty-seventh avenue South; thence on Twenty-seventh avenue South to Twenty-sixth street; also in compliance with a previous resolution of the City Council, to construct a cable line on First avenue South and Nicollet avenue to take the place of the present steam motor. We also, by direction of the City Council, built an electric line on Fourth avenue South in order to test the efficiency of electric power.

The electric line on Fourth avenue South seems to be a perfect success, and we are daily solicited by residents in almost every part of the city to substitute electric lines for the proposed cables. It is a matter of grave importance not only to the company, but to

the City of Minneapolis and the traveling public. My own judgment is that it would be better for the city and the public to substitute electricity for cables, but I do not care to take the responsibility of deciding the question. If the cables are constructed it will involve an immense outlay, which will not only be useless, but a public nuisance in case it is sought to change the power to electricity afterward. If we construct the cables as proposed, it will be adopted as a permanent motive power, as we cannot afterward afford to change it. We are convinced that electricity will furnish a better mode for rapid transit than the cable, and in view of this fact respectfully ask your honorable body to permit us to substitute electricity
117 for cable lines, and also to grant us the right to use electricity on all our present existing lines and extensions. It will cause no delay, as we will have more lines in operation during 1890 than contemplated in our former agreement.

Respectfully submitted,

THOMAS LOWRY,
President Minneapolis Street Railway Company.

That thereupon at the request of said Minneapolis Street Railway Company, said City Council did, on the 17th day of January, 1890, duly adopt and pass a certain other resolution entitled a "Resolution relative to electric street railways in the City of Minneapolis," which was thereafter and on the 20th day of January, 1890, duly approved by the mayor of said city and was thereupon duly published, and which resolution was in the words and figures following, to-wit:

Resolved by the City Council of the City of Minneapolis:

That the Minneapolis Street Railway Company be and is hereby permitted and authorized to substitute experimental electric street railway lines substantially similar to the one heretofore constructed and now being operated by it on Fourth avenue South, on the conditions hereinafter contained, on the following lines:

First. On the two lines which by the resolutions of the council, passed July 19, 1889, and approved July 26, 1889, and by resolution of the council passed June 29, 1889, and approved July 1, 1889, it was authorized and by its agreement made in pursuance to said resolution it agreed to construct and put in operation cable lines during the year 1890, to-wit: The Washington avenue and
118 the First avenue lines.

Second. On any of its existing horse car or motor line where it may desire and shall make such substitution during the year 1890, provided that said company shall within thirty (30) days after the passage of this resolution accept the above permission and agree to the following conditions:

A. If at any time on or before April 1, 1891, the City Council shall determine any or all of said electric lines to be unsuccessful, or not equal to the cable lines ordered, then this resolution shall be of no further force or effect and the council may order cable lines substituted on the Washington avenue and First avenue lines, according to the terms of the previous agreement, and may also order the discontinuance of electricity as a motive power on any of the

other lines that it may see fit where it is substituted under the terms of this resolution.

B. Said company shall not run on said electric lines more than two cars attached together, one of which shall be the motor car, and the trolley lines maintained by said company shall have such guards to prevent accidents as the council shall from time to time direct.

C. Said experimental electric lines substituted for cable lines shall be built and put in operation within the time prescribed by said resolution for building and putting in operation said cable lines respectively, for which electric lines are substituted.

D. The provisions of said resolution of July 19th, 1889,
119 and all other ordinances and resolutions of the council shall not be modified or affected hereby except in the particulars above indicated.

E. In case any other electric system preferable to the overhead wire system shall prove a practical success in other cities the Council shall have the right to designate any existing line operated by the Street Railway Company as the line on which the experiment with said new electric motive system, and said company shall at once proceed to equip said line so designated with said new electric system and if after the same has been operated six months, the Council deems it a practical and superior power to the overhead system the Council shall have the right to order the entire existing street railway system or any line or lines thereof to be operated with such new electric motive system.

F. The sureties on the bond executed for the faithful performance of the agreement made pursuant to the said resolution of July 19th, 1889, shall in writing with thirty days signify ther consent to the modifications of said agreement as contained herein or the Minneapolis Street Railway Company shall substitute a like bond satisfactory to the City Council.

G. If the said City Council shall not at any time on or before April 1, 1891, determine electricity to be an unsuccessful motive power, then the said Minneapolis Street Railway Company shall equip with electricity and put in running order all its then existing horse car or motor lines by December 1st, 1891.

120 H. All passenger cars on all electric lines shall run between extreme limits on all extensions to the heart of the city without change to passengers traveling thereon.

I. Whenever any electric or cable line crosses any city bridge, the weight of the rolling stock, together with the loads they may be required to carry, shall not be in excess of the weight that shall be determined by the City Engineer as a safe load upon such bridge, and whenever or wherever city bridges are crossed by any line of street railway, the kind of rail to be used shall be of such pattern as to have a flange of not less than five inches in width and shall be subject to the approval of the City Engineer, and wherever it may be determined by said engineer that any part or portion of said bridge requires strengthening on account of the conditions of loading, necessitated by the use of said bridge for street railway purposes, said street railway company shall be required to make the

necessary changes at its own cost and expense. All changes made to be under the direction and to the satisfaction of the City Engineer.

That thereafter and on the 27th day of January, 1890, the board of directors of said Minneapolis Street Railway Company duly convened for that purpose determined and declared it to be for the best interest of said company to accept the provisions and agree to the conditions stated in said resolution last above set forth, and did thereupon accept of the provisions and agree to the conditions in said resolution stated, and authorized the president of said
121 company to sign an acceptance in writing of the provisions and conditions in said resolution stated for and on behalf of said compay and to affix its corporate seal thereto for and in its behalf and file the same with the city clerk of said city.

And, thereupon, said Minneapolis Street Railway Company did within thirty days after the passage of the resolution last set forth, by its president, file with the city clerk of said city its acceptance of the permission thereby conferred and its agreement to comply with the conditions thereof, which acceptance was duly sealed with its corporate seal and was attached to and accompanied by a copy of said ordinance of said City Council last above set forth, and which acceptance was in the words and figures following, to-wit:

STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

Whereas, the City Council of the City of Minneapolis, on the 17th day of January, A. D. 1890, passed a certain resolution entitled, "Resolution Relative to Electric Street Railways in the City of Minneapolis"; approved by the mayor of said city on the 20th day of January, A. D. 1890, and duly published in the official paper of said city on the 23rd day of January, A. D. 1890—a printed copy of which resolution is hereto attached, and,

Whereas, at a meeting of the board of directors of the Minneapolis Street Railway Company, held on the 27th day of January, A. D. 1890, it was resolved by said company to accept the permission and agree to the conditions of said resolution and that an acceptance in writing signed by the president of said company, and under
122 its corporate seal, be filed with the city clerk of said city, in accordance with the terms of said resolution.

Now therefore, the said Minneapolis Street Railway Company has accepted, and does hereby accept the permission and agree to the conditions of said resolution passed by the City Council of the City of Minneapolis, as aforesaid.

In witness whereof, the president of said Minneapolis Street Railway Company has signed the acceptance and affixed hereto the corporate seal of said company, this 28th day of January, A. D. 1890.

THE MINNEAPOLIS STREET RAILWAY COMPANY,
By THOMAS LOWRY, *President.*

[Seal of Minneapolis Street Railway Company.]

That said lines on Washington avenue and First avenue south mentioned in said resolutions respectively passed as aforesaid on said 29th day of June, 1889, and on July 19th, 1889, were fully completed according to the requirements thereof as modified by said resolution last above set forth and were in actual operation prior to the 27th day of June, 1890.

Seventh. That all existing street car lines in said city are now operated by said Minneapolis Street Railway Company by and with electricity as a motive power, and have been in existence and been so operated since January 1st, 1892. And that the rights and privileges acquired by said city and its inhabitants and passengers upon the various lines of said Minneapolis Street Railway
123 Company by the said resolutions and acceptances and agreements hereinbefore mentioned and by the completion and operation of said lines upon Washington avenue and First avenue south as aforesaid, have in no respect heretofore been abridged, lessened, surrendered or lost by any action of said city or otherwise.

That at all times since the completion of said lines last above mentioned said Minneapolis Street Railway Company has been and is bound and obligated to issue and give to any passenger upon any of its connecting lines demanding the same, who should pay one full fare, and said passenger was and is entitled to receive from said company, a transfer check entitling him to a continuous passage upon any connecting line without payment of any additional sum therefor.

Eighth. That on the 19th day of September, 1890, said City Council at the request of said Minneapolis Street Railway Company duly passed a certain ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," which was thereafter and on September 22nd, 1890, duly approved by the mayor of said city and was thereupon duly published. And thereby said City Council among other things extended the time within which said company should or might equip many of its railway lines for operation by electricity as a motive power to the 31st day of December, 1891, and did further enact and ordain that in the construction, maintenance and operation of its said lines of street railway said Minneapolis Street Railway Company should at all times be subject to all the conditions and limi-
124 tations and other provisions of all ordinances of said city then in force or which might thereafter be adopted, as far as applicable. And by said ordinance so adopted and passed as aforesaid on said 19th day of September, 1890, it was further enacted and ordained as follows, "Before this ordinance shall be in force and effect, the said Street Railway Company shall accept same by filing with the city clerk of said city its written acceptance thereof, within thirty days from the passage of this ordinance, agreeing to carry out all the matters and things herein contained, and all the rights hereby granted are conditioned upon the faithful performance by said Street Railway Company of all the agreements herein contained on its part to be done or performed."

That thereafter and on the 23rd day of September, 1890, the board of directors of said Minneapolis Street Railway Company, duly convened for that purpose, did determine and declare it to be for the best interest of said company to accept said ordinance last above mentioned, and did thereupon accept said ordinance and agree to carry out all the matters and things therein contained, on the part of said company to be performed, and authorized its vice president and secretary on its behalf and under its corporate seal to execute and file with the city clerk its written acceptance of said ordinance and its agreement to carry out all the matters and things in said ordinance contained.

And, thereupon, and within thirty days from the passage of said last mentioned ordinance, said Minneapolis Street Railway Company, by its vice president and secretary, did accept the same by filing with the city clerk of said city its written acceptance thereof,
125 agreeing to carry out all the matters and things therein contained, which acceptance so filed was sealed with its corporate seal and was in the words and figures following, to-wit:

STATE OF MINNESOTA,
County of Hennepin, City of Minneapolis, ss:

Whereas, the City Council of the City of Minneapolis, on the 19th day of September, A. D. 1890, passed a certain ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity;" which ordinance has been duly approved by the mayor of said city, and published, as required by law; and which ordinance required its acceptance by said street railway company;

And whereas, at a meeting of the board of directors of said street railway company, held on the 23rd day of September, A. D. 1890, it was resolved by said company to accept said ordinance and to comply with the terms and provisions thereof and that an acceptance in writing under its corporate seal should be made by its vice president and secretary and filed with the city clerk of said city.

Now, therefore, in accordance with said resolution the said Minneapolis Street Railway Company has accepted, and does hereby accept, the said ordinance and agrees to carry out all the matters and things therein contained, on its part to be performed.

In witness whereof, the vice president and said secretary of the Minneapolis Street Railway Company have signed this ac-
126 ceptance and affixed hereto the corporate seal of said company, this 25th day of September, A. D. 1890.

C. G. GOODRICH,
Vice President.
E. H. CENTER,
Secretary.

[Seal of Minneapolis Street Railway Company.]

That thereafter and on the 14th day of July, 1893, said City Council duly enacted and passed a certain other ordinance which was not signed by the mayor of said city, but was duly returned by him to said City Council with his objections thereto; and at the next meeting of said City Council, held on the 28th day of July, 1893, notwithstanding said objections of the mayor, said ordinance was passed by a vote of two-thirds of all the members of said City Council, and was thereupon and on August 3d, 1893, duly published. And thereby it was enacted and ordained in and by said last mentioned ordinance that said ordinance theretofore passed, as aforesaid, on September 19th, 1890, be and the same thereby was amended so as to provide concerning said company, its said lines and its cars thereon, as follows, to-wit:

Passenger cars on said lines shall run between extreme limits on extensions to or near the intersection of Hennepin and Nicollet avenues, without change to passengers traveling thereon; and said street railway company shall deliver, at the junction or intersection of any of its lines within the City of Minneapolis, a transfer to any passengers demanding the same, and who shall pay one full fare, which transfer shall entitle the passenger so receiving the same to a continuous passage on the line so intersected, joined or connected
127 with; said transfer shall be issued to said passenger by the conductor or other agent of said company and from and upon the car on which said passenger has paid his full fare, provided that no passenger shall be entitled to more than one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage and shall be used on the next car departing on the connecting or intersecting line on which it is to be used; but said company shall not be required to issue transfers for through travel to or from the interurban cars now operated between the cities of Minneapolis and St. Paul; provided that transfers for local transportation shall be issued to and from interurban cars to all persons using said cars for local travel. All interurban cars shall continue to stop at the same number of crossings as at present and at such other crossings as the council shall hereafter direct.

If any of the railway lines of said company do not intersect or connect with all the lines of said company in said city, then transfers shall be issued, in the manner hereinbefore set forth, from the cars operated on said non-intersecting and non-connecting lines to such other lines at the point where said cars nearest approach the intersection of Washington and Hennepin avenues in said city.

That the ordinance last above mentioned and the provisions thereof above quoted and set forth have at all times since the passage and enactment of the same remained in full force and effect and in no wise or degree repealed by said City Council.

128 Ninth. That at all times since the passage of said last mentioned ordinance one or more of said street railway lines of said company within said city have intersected, joined and connected with, and do now intersect, join and connect with, one or

more other lines of said street railway at a point in Hennepin avenue, between Twenty-ninth and Thirtieth streets and at thirty-three other different points in said city, which are respectively one or more blocks distant from each other, and which points are respectively at the intersection or junction of the following streets and avenues of said city, viz: Of Washington avenue with Twentieth avenue north, of said Washington avenue with Plymouth avenue, of said Washington avenue with Sixth avenue north, of said Washington avenue with Third avenue north, of said Washington avenue with Hennepin avenue, of said Washington avenue with First avenue south, of said Washington avenue with Cedar avenue, of Hennepin avenue with High street, of said Hennepin avenue with Third street, of said Hennepin avenue with Sixth street, of said Hennepin avenue with Seventh street, of said Hennepin avenue with Twelfth street, of said Hennepin avenue with Lyndale avenue, of said Hennepin avenue with Douglas avenue, of said Hennepin avenue with Thirty-first street, of First avenue south with Third street, of said First avenue south with Fourth street, of said First avenue south with Sixth street, of Lyndale avenue with Thirty-first street, of Nicollet avenue with said Thirty-first street, of Bryant avenue with said Thirty-first street, of Fourth avenue south with Fourth street, of said Fourth avenue south with Sixth street, of Eighth avenue south with said Sixth street, of Emerson avenue north with
129 Twentieth avenue north of Riverside avenue with Cedar avenue, of Cedar avenue with Thirty-second street, of Bloomington avenue with Thirty-second street, of Central avenue with Second street northeast, of Central avenue with Fourth street southeast, of Central avenue with Monroe street, of Fourth street southeast with Fifteenth avenue southeast, and of Oak street with Washington avenue southeast.

That hereto attached and marked "Exhibit A" and made a part hereof is a true and correct map or plat of said city as the same now is, correctly showing the various lines of street railway within said city now operated by said company, the streets whereon the same are located as aforesaid and the various points where said lines intersect, connect and join as hereinbefore stated. And that each of said lines of street railway so connecting, intersecting and joining at the points aforesaid is now operated by said Minneapolis Street Railway Company and passenger cars are regularly run each day upon each line thereof under the charge, care and control of a conductor employed by said company. And that each of the streets and avenues hereinbefore mentioned, upon which are located any of said lines of railway, is, and for many years last past has been, a public street and highway of said city much used and traveled by the inhabitants thereof and others having occasion to use the same.

That said Minneapolis Street Railway Company, its officers and agents, including its conductors and other agents upon each of the cars operated by it and each and all of them, in disregard of the rights of said city and of the rights and privileges of its inhabi-

tants and others seeking transportation and passage upon its lines of street railway, have heretofore failed, neglected and re-
130 fused, and still do neglect and refuse, in the particulars hereinafter set forth, to comply with or obey the requirements, terms or conditions of said resolution hereinbefore set forth or of said ordinance last above mentioned, or to fulfill or perform its duties or obligations thereby and by its agreements and acceptance herein alleged imposed upon and assumed by it.

That said company and its officers, agents and conductors, and each of them, have heretofore at all times neglected and refused, and now do neglect and refuse to issue or deliver upon or from any car, operated by said company, to any passenger thereon any transfer check or transfer, or to issue or deliver any such check or transfer to any passenger at any place or point, except at a certain point in said Hennepin avenue between said High street and said Washington avenue or at one of said connecting points located respectively at the intersection of the following streets and avenues, viz., of said Hennepin avenue with Washington avenue, of said Hennepin avenue with Third street, of said Washington avenue with Cedar avenue, of said Washington avenue with First avenue south, of said Washington avenue with Plymouth avenue, of said Washington avenue with Twentieth avenue north, of Second street northeast with Central avenue, and of Oak street with Washington avenue southeast.

And except at the said points last above mentioned, said Minneapolis Street Railway Company and its said officers, agents and conductors, and each and all of them, have heretofore refused, and do now refuse to transport or carry any passenger leaving a car of said company upon any of its said lines at any intersecting or connecting point or junction herein mentioned, upon any other car leaving such point, or to allow such passenger to have con-
131 tinuous passage upon any line other than the said line upon which said passenger reaches said point without the payment by him of an additional fare therefor. And when a passenger upon any line of said company, having paid one full fare thereon, upon reaching any of said intersecting or connecting points or junctions where no transfer check or transfers have been or are issued by said company, demands or attempts to obtain a continuance passage upon any line there connected, intersected or joined with, as he is entitled to do by the provisions of said resolutions and ordinance without the payment of any additional fare therefor, the conductors and agents of said company, on its cars upon said line so intersected, connected or joined with, have heretofore and now do eject such passenger therefrom or by threats of violence or arrest or other abuse and ill treatment prevent or deter him from so obtaining such continuous passage thereon.

That said City of Minneapolis contains upward of 200,000 inhabitants, and each of the said points where transfers have been and are issued by said company, and especially said point in Hennepin avenue between High street and Washington avenue, is within the lim-

its of a business street of said city much used and traveled and at times much crowded by vehicles and foot passengers thereon. And the issuance of transfer checks or transfers at each of said points upon the street and the omission by said company to issue transfers at the connecting points where it refuses to issue the same as aforesaid creates much confusion, disorder, disturbance and obstruction upon said street and occasions much discomfort, annoyance, inconvenience and danger to passengers and others thereon which would not
132 be created or occasioned did said company obey said ordinance and fulfil its obligations and duties imposed upon and assumed by it as aforesaid.

That by reason of the wrongful acts and omissions of said company in its failure and refusal to issue transfers to passengers or to allow continuous passage to those entitled thereto, without the payment of an additional fare for the same, and in its failure and refusal to issue or deliver transfers or transfer checks upon its said cars, said company each day exacts and extorts without right large sums of money upon its said cars from the inhabitants of said city and others seeking passage thereon.

And your relator, the City of Minneapolis, has no plain, speedy or adequate remedy in the usual course of law for the prevention of the wrongful acts and omissions of said Minneapolis Street Railway Company herein complained of.

Wherefore, your relator prays that a writ of mandamus be issued out of this court and under the seal thereof to said Minneapolis Street Railway Company, commanding it and its officers and servants and its conductor or other agent upon each passenger street car operated by it to forthwith and hereafter obey the requirements of said resolutions hereinbefore set forth and of said ordinances so enacted and passed by said City Council, and hereafter deliver at any point within said city where any of its lines or tracks of street railway intersect, connect or join with any other line or track thereof, a transfer to any passenger other than a through passenger upon its interurban line, so-called, demanding the same, who shall have paid one full fare upon the car of said company upon which he shall ar-
133 rive at such point, which transfer shall be issued and delivered to such passenger by the conductor or other agent of said company from and on said car, and to thereupon allow and permit such passenger receiving such transfer to have continuous passage and transportation, without the payment of any additional fare, upon the next car leaving said point upon any line or track other than the one on which said passenger shall have reached said connecting point.

And that your relator have judgment for the costs and disbursements of this proceeding.

DAVID F. SIMPSON,
City Attorney, and
BROOKS & HENDRICKS AND
HALE & MORGAN,
Attorneys for Relator, The City of Minneapolis.

STATE OF MINNESOTA,
County of Hennepin, ss:

David F. Simpson being first duly sworn, on oath says that he is an officer of the relator named in the foregoing information, to-wit, its City Attorney; that he has read said information and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated on information and belief and as to such matters, that he believes it to be true.

DAVID F. SIMPSON.

Subscribed and sworn to before me this 11th day of November, A. D. 1893.

[NOTARIAL SEAL.] D. F. MORGAN,
Notary Public, Hennepin County Minnesota.

134 EXHIBIT "C."

STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

THE STATE OF MINNESOTA on Relation of THE CITY OF MINNEAPOLIS, Relator,
vs.
THE MINNEAPOLIS STREET RAILWAY COMPANY, Respondent.

Answer.

Now comes the respondent in the above entitled action, and reserving to itself the right to object to any and all proceedings under the writ in the above entitled matter, either on the ground of insufficiency, or want of power of the court to issue the same, or to entertain a hearing thereon, hereby makes answer and return thereto, as follows:

First. Admits that said relator is, and at all the dates and times in said writ stated was, a municipal corporation it has the care, supervision and control of under the laws thereof; and that as such municipal corporation it has the care, supervision and control of all highways, streets, avenues and alleys within the limits of said city.

Second. Admits that respondent, the Minneapolis Street Railway Company is, and at all dates and times in said writ stated, was a corporation of this state, duly created and organized under the laws thereof, with power and authority to construct, maintain and operate street railway lines in said city, under and by virtue of the power and authority vested in it by its charter, and the several ordinances and resolutions of said city council of the City of Minneapolis,
135 hereinafter referred to. But denies that the authority of this respondent to construct, maintain and operate street railway lines in said city was, or is, subject to such regulations, terms or con-

ditions as might, or may be, by said city prescribed, except as is provided in and by said charter, ordinances and resolutions.

Third. Admits that between July 15th, 1875, and July 19th, 1889, said Minneapolis Street Railway Company, with the permission, leave and license of said city, did construct upon many streets therein, lines of passenger street railway, with necesary tracks and other appliances therefor, and did operate thereon street railway cars. But denies that said street railway cars were propelled by animal power alone, and not otherwise.

Except as hereinbefore admitted, respondent denies each and every allegation, averment, matter and thing contained in the third paragraph of said writ.

Fourth. Further answering said writ, respondent denies each and every allegation, averment, matter and thing, contained, alleged or stated in the fourth paragraph thereof.

Fifth. Admits that on the 19th day of July, 1889, the City Council of said city duly adopted and passed a certain resolution entitled, "A Resolution Authorizing the Minneapolis Street Railway Company to Construct Cable and Electric Railway Lines in the City of Minneapolis, and Directing the Building of New and Extended Horse Car Lines," and that said resolution was thereafter and on the 20th day of July, 1889, duly approved by the mayor of said city, and was thereupon duly published, which resolution is set out in full in the fifth paragraph of said writ; and that afterwards, on August
136 first, 1889, said resolution was duly accepted by the said Minneapolis Street Railway Company, and its acceptance duly filed with the city clerk of said City; and the said Minneapolis Street Railway Company made and filed its bond in the sum of two hundred and twenty-five thousand (225,000) dollars, with sureties approved by said City Council, and conditioned according to the requirements of said resolution, as in said paragraph fifth of said writ stated.

Sixth. Admits that on the 14th day of January, 1890, Thomas Lowry, as president of the Minneapolis Street Railway Company, submitted to the City Council of said city a communication in writing, in substance as stated in paragraph sixth of said writ, and that said City Council did, on the 17th day of January, 1890, duly adopt and pass a certain resolution entitled "A Resolution Relative to Electric Street Railways in the City of Minneapolis," which resolution was, on the 20th day of January, 1890, duly approved by the mayor of said city, and was duly published, and which resolution was in words and figures stated and alleged in said sixth paragraph of said writ. And that thereafter, on the 28th day of January, 1890, the said Minneapolis Street Railway Company, by authority of its board of directors, duly made and filed its acceptance of the terms and conditions of said resolution, so passed by said City Council, as in said sixth paragraph of said writ stated.

Except as hereinbefore admitted, this respondent denies each and every allegation, averment, matter and thing alleged or stated in said sixth paragraph of said writ.

Seventh. Admits that all existing street car lines in said
137 City of Minneapolis are now operated by this respondent, said Minneapolis Street Railway Company, by and with electricity

as a motive power; but alleges that portions of said lines have been constructed and completed, and so operated by electricity since January 1st, 1892.

Except as hereinbefore admitted, respondent denies each and every allegation, averment, matter and thing alleged or stated in said seventh paragraph of said writ.

Eighth. Admits that on the 19th day of September, 1890, said City Council duly passed a certain ordinance entitled, "An Ordinance Authorizing the Minneapolis Street Railway Company to Construct and Maintain Tracks and to Operate All Its Railway Lines in the City of Minneapolis by Electricity," which ordinance is imperfectly and incorrectly set out in said writ: but which ordinance is in words and figures as follows, to-wit:

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company, its successors and assigns are hereby authorized to operate all its existing lines of street railway, in the City of Minneapolis, and all its lines hereafter constructed in said city, by electricity as a motive power; and to erect, construct and maintain upon and along the several streets and avenues of said city where such lines are, or may be located, all such poles, wires, conduits or other appurtenances and appliances as may be necessary to operate said lines of railway by electricity. Provided that upon all said railway lines where poles
138 are used, except the line now in operation, known as the Fourth avenue line, the poles shall be erected in the center of the street, with cross trees placed thereon from which the wires shall be suspended, and shall be so erected under the supervision and to the approval of the city engineer of said city.

SECTION 2. All the lines of street railway in the City of Minneapolis heretofore constructed by said Street Railway Company and now in operation, and all new lines and extensions of existing lines heretofore ordered by the City Council of the City of Minneapolis, or the building of which has by ordinance or resolution of said City Council been authorized, shall be constructed, completed and fully equipped for operation by electricity as a motive power, the St. Paul line, the Washington avenue line and the First avenue line on or before November 1st, 1890, the Hennepin avenue and Harrison street line on or before November 1st, 1891, and all other lines on or before December 31st, 1891.

SECTION 3. Said railway lines shall be constructed of the standard gauge, and shall be built upon the most approved method, so as to interfere as little as practicable with all other public uses of the streets, and both material and workmanship shall be the best of their class and kind, and the cars, used on said lines, shall be constructed and maintained with all of the latest improvements for the comfort and convenience of passengers, and shall be used for no other purpose than for the transportation of passengers, and the cars
139 upon said lines shall be run at a rate of speed not less than an average of eight miles per hour. Where the streets through

which said railway line runs are paved, or the surface thereof otherwise improved at the time the said lines are constructed, or at any time thereafter, the said company shall pave or otherwise improve the space between the rails of their tracks and between their tracks, so that it shall substantially correspond with the improvement of the street outside of the tracks.

SECTION 4. No more than two cars attached together shall be run on any of said lines except by special permission of the City Council, one of which shall be the motor car, and the trolley lines maintained by said company shall have such guards to prevent accidents as the City Council shall from time to time direct.

SECTION 5. In case any other electric system preferable to overhead wire system shall prove a practical success, the City Council shall have the right to designate any existing line, operated by said Street Railway Company, as a line on which to experiment with said new electric motive system, and said company shall at once proceed to equip said line so designated with said new electric system; and, if after the same has been operated six months the City Council deems it a practical and superior power to the overhead wire system, it shall have the right to order the entire existing street railway system, or any line or lines thereof, to be operated with such new electric motive system.

140 SECTION 6. Passenger cars on all said lines shall run between extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change to passengers traveling thereon; and after November 1st, 1890, said street railway company shall issue transfer checks at the junction of said lines, at Washington and Hennepin avenues, to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on either of said connecting lines; provided that no passenger shall be entitled to more than one transfer check for one fare; and provided further, that such transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used upon the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues.

SECTION 7. This ordinance is granted upon the express condition and requirement that said Minneapolis Street Railway Company shall pay to the city treasurer of the City of Minneapolis, on the first Monday of January in each year, commencing with the first Monday of January in the year 1892, an annual tax or license fee of twenty-five dollars ($25) per car for the average number of cars operated by it on its said lines of street railway during the next preceding
141 year.

SECTION 8. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance

entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable.

SECTION 9. The said street railway company shall hold the City of Minneapolis harmless from all damage of any kind whatsoever which may be caused by the work of construction in connection with putting up or maintaining poles or electric wires for said electric street railway lines, or which may be caused by reason of said poles and electric wires being placed and maintained as herein authorized.

SECTION 10. Before this ordinance shall be in force or effect, said the street railway company shall accept the same by filing with the city clerk of said city its written acceptance thereof, within thirty days from the passage of this ordinance, agreeing to carry out all the matters and things herein contained and all the rights hereby granted are conditioned upon the faithful performance by said street railway company of all the agreements herein contained on its part to be done or performed.

SECTION 11. This ordinance shall take effect and be in
142 force from and after its publication and acceptance by said company as hereinbefore provided.

Passed September 19th, 1890.

E. M. JOHNSON,
President of the Council.

Attest:
CHAS. F. HANEY, *City Clerk.*

Approved September 22d, 1890.

E. C. BABB, *Mayor.*

That said ordinance was thereafter and on September 22nd, 1890, duly approved by the mayor of said city, and was thereafter duly published; and that said ordinance was, on the 25th day of September, A. D. 1890, accepted by said Minneapolis Street Railway Company, by an instrument in writing duly authorized by its board of directors, and executed and filed as in said paragraph eighth of said writ stated.

Except as hereinbefore admitted, respondent denies each and every allegation, averment, matter and thing, contained, set forth or alleged in paragraph eighth of said writ.

Ninth. Admits that at all times since the 14th day of July, 1893, the several street railway lines of said street railway company within said city have intersected, joined and connected with, and do now intersect, join and connect with one or more other lines of said street railway at the different points and as stated in paragraph ninth of said writ, except at a point in Hennepin avenue between Twenty-ninth and Thirtieth streets, except also at the intersection or junction of Eighth avenue south with said Sixth street, except also at the intersection or junction of Cedar avenue with Thirty-second street,
except also at the intersection or junction of Bloomington
143 avenue with Thirty-second street, except also at the intersection or junction of Oak street with Washington avenue south-

east; and this respondent does aver that as to each and all of the points last named, one or more of said street railway lines of said city have not intersected or joined or connected with, and do not now intersect, join or connect with one or more other lines of said street railway, as alleged in said ninth paragraph of said writ or otherwise. And this respondent further admits that the map attached to said writ, "Exhibit A," is a correct map and plat of said city as the same now is, and correctly shows the various lines of street railway within said city, now operated by this respondent, the streets whereon the same are located, and the various points where said lines connect, intersect or join, except that said Como avenue line does not, as represented upon said map, connect and join with the line of street railway on said Fifteenth avenue southeast; also except that said line on Second street northeast does not connect with said line on Fourth street southeast as shown on said map; except also that said Thirty-first street line does not extend from said Nicollet avenue to Fourth avenue south, as shown on said map; except also that said Bloomington avenue line does not connect with said Cedar avenue line, as shown on said map; except also that said Eighth avenue south or Chicago avenue line does not connect with said Bloomington avenue line, as shown on said map; except also that said Interurban line does not connect on University avenue with the line upon Fourth street southeast, as shown upon said map. And this respondent further admits that each of said lines of street railway, so connecting, intersecting and joining with the exceptions above named, is now operated by this respondent, and pas-
144 senger cars are regularly run each day upon each line thereof, under the charge, care and control of a conductor, employed by this respondent; and that each of the streets upon which are located said lines of railway is a public street and highway of said city.

Admits that said Minneapolis Street Railway Company, its officers and agents, including its conductors and other agents, have heretofore refused, and do now refuse, to issue or deliver upon or from any car operated by said company to any passenger thereon any transfer check or transfer, or to issue or deliver any such check or transfer to any passenger at any place or point except at a certain point in said Hennepin avenue between High street and Washington avenue, or at one of said connecting points located respectively at the intersection of the following streets and avenues, viz., of said Hennepin avenue with Washington avenue, of said Hennepin avenue with Third street, of said Washington avenue with Cedar avenue, of said Washington avenue with First avenue south, of said Washington avenue with Plymouth avenue, of said Washington avenue with Twentieth avenue north, of Second street northeast with Central avenue, and of Oak street with Washington avenue southeast, the same being the points at which by virtue of the resolutions and ordinances hereinbefore and hereinafter set forth respondent is legally obligated to issue transfers.

Except as hereinbefore admitted, qualified or denied, respondent denies each and every allegation, averment, matter and thing in the ninth paragraph of said writ alleged or stated.

Except as hereinbefore admitted, qualified or denied,
145 respondent denies each and every allegation, averment, matter and thing in said writ alleged or stated.

II.

And for a further answer and return to said writ said respondent does allege and show to the court, that upon the 9th day of July, A. D. 1875, said City of Minneapolis, in pursuance of its charter, and of the powers and authority conferred upon it by law, duly made and passed its certain ordinance, entitled as follows, to-wit: "An ordinance authorizing and regulating street railways in the City of Minneapolis," which said ordinance was duly passed and confirmed by a majority of the members of the City Council of said city, present, by yeas and noes, and thereafter and upon the 17th day of July, A. D. 1875, was approved by the mayor of said city, and thereafter was duly published in the official paper of said city, and recorded by the city clerk, all as required by law; a copy of which ordinance is hereunto annexed, and marked "Exhibit A," and is made a part hereof.

That thereafter, and within thirty days after publication, as aforesaid, of said ordinance, said respondent filed with the city clerk of said city a written acceptance of the grants in said ordinance made, with the conditions, regulations and limitations therein expressed, signed by the president and secretary of said respondent corporation; and thereby the rights, privileges and franchises contained and granted in said ordinance, became, in accordance with the terms thereof, vested in said plaintiff.

That thereafter, the people of the state of Minnesota, in legislature assembled, in the session thereof, holden in and for the year A. D. 1879, did duly ratify, legalize and confirm the aforesaid ordi-
146 nance, and all the rights, privileges and franchises therein and thereby confirmed unto said respondent, its successors and assigns, to the full extent of all the rights and privileges and franchises, conferred or attempted to be conferred by said ordinance, by a certain enactment, entitled "An act to confirm the grant of the City of Minneapolis to the Minneapolis Street Railway Company," approved upon the 4th day of March, A. D. 1879, a copy of which enactment is hereunto annexed, and marked Exhibit "B," and is hereby made a part hereof.

That said City of Minneapolis, by said ordinance, and by the terms and provisions therein named, and by the acceptance thereof, as aforesaid, by this respondent, contracted and agreed with this respondent, its successors and assigns, among other things, that in consideration of the performance, on its part, of all the conditions, stipulations and requirements, in said ordinance provided, it, the said respondent, its successors and assigns, for the full term of fifty (50) years, from the first day of July, A. D. 1873, and during the full term of its charter, should have the exclusive right of regulating and establishing, at the expiration of five (5) years from the said 17th day of July, A. D. 1875, the said time of the approval of said ordinance, and at the expiration of every five (5) years thereafter, the rates to be charged by it, the said respondent, for the transporta-

tion of passengers over its street railway lines in said city, fixing the same at such rates as the City Council of said city may deem just and reasonable; and further, that it, said city, during said term of fifty (50) years, would not reduce the fare for passengers below five (5) cents over any one continuous line; and further, that
147 said City Council of said city, having, by the terms of said ordinance the right to designate what shall be considered a "continuous line," should not, during said term of fifty (50) years, designate any such "continuous line" to be more than three (3) miles in length.

That after said acceptance of said ordinance by said respondent, and prior to the adoption and approval, by said City Council of said city, of that certain resolution, entitled "A resolution authorizing the Minneapolis Street Railway Company to construct cable and electric railway lines in the City of Minneapolis, and directing the building of new and extended horse car lines," set out in the fifth paragraph of said writ, and prior to the said acceptance of said resolution by this respondent, said City Council of said city, pursuant and subject to the provisions of said ordinance, Exhibit "A," by divers ordinances and resolutions supplemental thereto, duly approved, enacted and adopted, did, from time to time, designate divers extensions of said street railway lines, enumerated and contemplated in said ordinance, Exhibit "A," and also did designate divers other streets in said city deemed suited to street railways, and divers and certain new lines of railway in the said streets of said city, and demanded by the public necessity thereof, and did thereby require the said respondent, subject to the provisions of said ordinance, Exhibit "A," to extend, construct and operate said extended and new railway lines in the streets of said city, and thereupon and prior to the 19th day of July, 1889, this respondent had constructed and was operating a system of street railways, in the City of Minneapolis, under and by virtue of the provisions of said ordinances and resolutions, which
148 system extended over a large part of the said city and the streets thereof, and embraced in all about eighty-seven and 11-100 (87.11) miles of street railway, a portion of which was operated by horse power and a portion of which, by consent and license of said City Council, was operated by steam as a motive power. That prior to said July 19th, 1889, the operation of street railway lines by cable had been introduced and was found to be practicable and desirable, and the operation of street railway lines by electricity as a motive power had, to some extent, also been introduced and was being used in different places; and on account of the more rapid transit attained by the use of electricity as a motive power, it was deemed desirable, both by the City Council of the City of Minneapolis, and this respondent, to use cable or electricity, or both, as a motive power, in propelling the cars of the respondent upon its said street railway lines, if the same should be found to be practicable and expedient.

And thereupon, on said 19th day of July, 1889, said City Council duly made and adopted the certain resolution set out in paragraph five of said writ, which resolution was intended to be, and was, supplemental to said ordinance, Exhibit "A," and the other ordinances

and resolutions hereinbefore referred to, supplemental thereto, and which resolution was accepted by this respondent, and the bond, required by it to be given, was, by it, given and filed as in paragraph five of said writ stated.

That subsequently and before any of the cable lines required by said resolution were constructed, it was deemed advisable and expedient, both by said City Council and this respondent, that no cable lines should be built in said city, and that electricity as a
149 motive power should be substituted and used in the place of cable, upon the lines mentioned in said resolution; and thereupon, on the 17th day of January, 1890, the said City Council of said city duly adopted and passed the certain other resolution mentioned in paragraph six of said writ, entitled "A resolution relative to electric street railways in the City of Minneapolis," which was duly approved by the mayor of said city, and published as in said writ stated, and was accepted by this respondent, as in said paragraph six of said writ is also stated; and that said resolution so passed was intended to be, and was, supplemental to said ordinance, Exhibit "A," and the other ordinances and resolutions hereinbefore referred to; that afterwards, and prior to the construction and completion of the railway lines or any of them, in either of the resolutions referred to, it was deemed advisable and expedient, both by the City Council of Minneapolis, and this respondent, that all of the existing, contemplated and future lines of street railway, in said city, should be operated by electricity, as a motive power, and that certain other agreements, stipulations and covenants, between said city and said street railway company, relating to the construction and operation of said lines, should be made and entered into, and thereupon, for that purpose, and for the purpose of consolidating and concentrating into one contract and agreement, all of the provisions, stipulations, covenants and conditions, to be observed and kept by the respective parties, relating to respondent's street railway lines and the operation thereof, by electricity as a motive power, and as supplemental to said ordinance, Exhibit "A," and the other ordinances and resolutions
150 hereinafter referred to, the said City Council of the said City of Minneapolis, did, on the 19th day of September, A. D. 1890, duly pass and adopt a certain ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its lines in Minneapolis by electricity," which is the same ordinance referred to in paragraph eight of said writ, and which ordinance is hereinbefore, and in paragraph eight of this answer set out at length and in full, and which is, by reference thereto, hereby made a part of this separate defense the same as though herein again set out at length.

That said ordinance was on the 22d day of September, A. D. 1890, duly approved by the mayor of said city, and was thereafter duly published as required by law, and was, on the 25th day of September, A. D. 1890, duly accepted by this respondent as in paragraph eight of said writ stated.

That after the adoption and acceptance of said ordinance last above referred to, this respondent, under the provisions thereof, rebuilt and reconstructed its entire system of street railways in the City of Min-

neapolis, and prior to the 25th day of November, A. D. 1892, was operating the same, and all thereof, under and in accordance with the provisions of said ordinance; that prior to the 25th day of November, 1892, it was deemed expedient and essential and for the best interests of said City of Minneapolis and this respondent, that certain changes in said ordinance and in the construction and operation of the street railway lines of this respondent, thereunder, should be made, and thereupon, on said 25th day of November, A. D. 1892,

151 said City Council of Minneapolis duly passed and adopted a certain ordinance entitled "An ordinance amending an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines, in the City of Minneapolis, by electricity,'" passed September 19th, 1890, and approved September 22d, 1890; which said ordinance was duly approved on the 26th day of November, A. D. 1892, and was thereafter duly published, as required by law, and which said ordinance was afterwards, and on the 29th day of November, A. D. 1892, duly accepted by said Minneapolis Street Railway Company, by resolution duly adopted by its board of directors; and on said 29th day of November, A. D. 1892, the said acceptance of said ordinance by said Minneapolis Street Railway Company was duly made, in writing, and filed with the city clerk of said city, as by said ordinance required, copies of which ordinance and acceptance are hereto attached, marked Exhibit "C" and Exhibit "D" respectively, and made a part hereof.

That thereafter and prior to the 23d day of December, A. D. 1892, it was deemed advisable and expedient by said City Council of Minneapolis, and this respondent, to make certain other changes in regard to the construction and operation of respondent's lines of street railway by electricity, and to that end and for that purpose, on said 23d day of December, A. D. 1892, said City Council of the City of Minneapolis, duly passed and adopted an ordinance entitled "An ordinance amending an ordinance entitled 'An ordinance authorizing the Mineapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minne-

152 apolis by electricity,' passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892," which ordinance was duly approved, on the 29th day of December, A. D. 1892, and was thereafter duly published as required by law, and which ordinance was afterwards, and on the 2d day of January, 1893, duly accepted by said Minneapolis Street Railway Company, by resolution duly adopted by its board of directors; and on said 2d day of January, 1893, the said acceptance of said ordinance by said Minneapolis Street Railway Company, was duly made in writing and filed with the city clerk of said city, as by said ordinance required, copies of which ordinance and acceptance are hereto attached, marked Exhibit "E" and Exhibit "F" respectively, and made a part hereof.

And that said ordinance passed September 19th, 1890, entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," as so amended, by the ordi-

nance last above referred to, Exhibit "E," is still in full force and effect, and is a valid and binding contract and agreement between the relator herein and this respondent, and that said ordinance, except as heretofore stated, has never been, by said City Council, amended, altered or changed, and cannot be amended, altered or changed, without the consent of this respondent. That this respondent has never consented, in any form, to any amendment or change thereof, except as hereinbefore stated, and that any other attempted alteration or amendment of said ordinance, by said City Council, whether as in said writ stated, or otherwise, is illegal, null and void, and
153 in violation of article I, section XI, of the constitution of the State of Minnesota, and of article I, section IX of the constitution of the United States, concerning the limitation of the powers of said state to pass or enact any law impairing the obligation of contracts.

And further answering, this respondent does aver: that relying in good faith upon the faithful performance, by the City of Minneapolis, of all the covenants, agreements and conditions, made and undertaken, by said city, in said ordinances and contract, Exhibit "A," and said other ordinances hereinbefore set forth and supplemental thereto, and relying upon the faithful observance, by said relator, of said contract, agreement, covenants and conditions, and in good faith believing, that this respondent, its successors and assigns would have and enjoy the rights and privileges aforesaid granted and conferred upon it by said ordinance, Exhibit "A," and said other ordinances, subject only to the conditions and obligations therein and thereby imposed upon this respondent, it did in reliance thereon and not otherwise, forthwith, after its acceptance thereof, undertake and enter upon the construction, operation, reconstruction and rebuilding of all its lines of street railway, in the City of Minneapolis, and upon the operation thereof by electricity, as in said ordinance of September 19th, A. D. 1890, was contemplated and provided, and within the time provided by said ordinance, as amended, and in all respects, in accordance with the terms and conditions thereof, did construct and put in operation, by electricity, all of its lines of street railway, in said City of Minneapolis, and has, ever since, maintained, kept and operated, and still maintains, keeps and operates,
154 each and every one of its said street railway lines, and every part thereof, strictly in accordance with the terms, provisions, stipulations and conditions, of said ordinance, Exhibit "A," and of said ordinance of September 19th, A. D. 1890, as the same has been amended as hereinbefore stated. That since January 1st, 1890, in the construction, reconstruction and adaptation of its lines of street railway, to operation by electricity as a motive power, respondent has necessarily laid out and expended the sum of more than five million (5,000,000) dollars, which it would not have done and could not have done except in reliance and upon the faith of the provisions, conditions and stipulations of said ordinance, Exhibit "A," and said ordinance of September 19th, A. D. 1890, as so amended, and that unless said ordinances and the provisions, grants, privileges, conditions, terms and agreements, therein contained are maintained, re-

spected and carried out, by said relator, this respondent has no adequate protection or security for the money so invested or expended, nor any means of obtaining any adequate or reasonable compensation therefor, or for the use thereof; that in reliance upon the obligations of said ordinances and upon the faithful performance thereof, upon its part, in good faith, by said relator, this respondent has in every respect, and in good faith, complied with all the terms, conditions, provisions and stipulations in said ordinances contained, and has always performed and is performing all of the obligations and duties imposed upon it by said ordinances, or assumed, or undertaken, by it, in its acceptances thereof; and that it has in every respect, especially, fully complied with and carried out all of the terms,
155 conditions, agreements and obligations, of section six of said ordinance of September 19th, A. D. 1890, as the same has been, by said City Council and this respondent, amended as hereinbefore stated; and that the provisions, stipulations and conditions of said ordinance, and especially the provisions of section six thereof, as so amended, are in all respects just and reasonable, necessary and proper, and should be carried out and complied with as therein stated.

That respondent's said several lines of street railway, as so built, constructed and operated, by it, constitute and comprise a full, complete and perfect system of street railway, for the City of Minneapolis, throughout its entire corporate limits of, to-wit: one hundred sixteen and 367-1,000 (116.367) miles; its said several lines converging in the business center of said city and diverging thence to all parts of said city in such manner and by such routes and lines and connections as will, and do, best accommodate the wants and needs of the citizens of said city, and all people having occasion to go by street railway to and from the different parts of said city, and that its system of street railways as at present conducted and operated by it, has and does fully supply the wants of said public, and in every respect serves and accommodates the citizens of Minneapolis, and other people having occasion to use street railways in said city, as well as it is feasible or practicable for any system or lines of street railway to do.

That all of its lines of street railway in said city reach one or more of the points mentioned as transfer points in section six of said ordinance of September 19th, 1890, as amended as hereinbefore stated, so that by the present system of transfers provided by said section
156 six as so amended, and as adopted and carried out by this respondent, passengers upon said lines of street railway from any part of said city can have a continuous passage, for one fare, to the extreme limits of said city in either direction, a distance exceeding in very many instances of from eight to ten miles.

And this respondent does further aver that to require transfers to be given by this respondent at the points of intersection of each and every line of said street railway, in said city, would impose upon this respondent an unjust and unreasonable burden; would deprive it of just and reasonable compensation for the services performed by it as a common carrier, and would require it to transport passengers

over its said lines in said city at rates that are unjust and unreasonable, and would be unjust and burdensome, as well as illegal and in violation of the contract entered into between it and said relator.

III.

And for a further answer and return to said writ, this respondent, herein and hereby alleging and averring all and singular the allegations and averments made heretofore and in the second separate defense of this answer and return in the same manner and as fully as if they were again herein made, does allege, that, by reason of said allegations and averments, no duty specially or otherwise enjoined by law upon said respondent resulting from any office, trust, or station, or otherwise, or no duty public or otherwise, imposed upon said respondent by operation of law, or no breach of such duties, or duty, or no facts from which said duties or duty, or breach, may result or be implied, or upon which a writ of mandamus may be based or issued to this respondent, have been shown to, or placed upon
157 the record of this court in this proceeding. And this respondent does further allege that by reason of said allegations and averments, this court has no jurisdiction in this proceeding to afford the relief sought herein, and that said relator has a plain, speedy and adequate remedy in the ordinary course of law, if entitled to any remedy or relief whatever.

IV.

And for a further answer and return to said writ, by protestation, not confessing or acknowledging all or any of the matters and things in said writ contained to be true in such manner and form, or otherwise, as the same are therein and thereby set forth and alleged, this respondent does aver that it appears upon the face of said writ, that it does not state facts showing any duty, specially or otherwise enjoined by law upon said respondent, resulting from any office, trust or station, or otherwise, or any duty, public or otherwise, enjoined upon said respondent by operation of law, or any breach of such duties or duty; and that it does not state facts from which such duties or duty, or breach, may result or be implied; and that it does not state facts upon which a writ of mandamus may be issued to this respondent, or allowed by this court; and that it does not state facts sufficient to constitute a right of action by this special proceeding, or any cause of action whatever. And this respondent does further aver that it appears upon the face of said writ, that it does not state facts sufficient to give this court jurisdiction in this proceeding; that this court has no jurisdiction in this proceeding to afford the relief sought herein, and that said relator has a plain, speedy and adequate remedy in the ordinary course of law, if entitled to any remedy or
158 relief whatever. And this respondent claims and reserves to itself the same rights, and the same benefits of this defense, that it might have had by means of a motion to quash said writ, or as if this respondent had demurred thereto.

Wherefore this respondent prays judgment that a peremptory writ of mandamus be denied herein; that said relator take nothing

by this proceeding; and that this respondent go hence without day and recover its cost and disbursements herein.

KOON, WHELAN & BENNETT AND
M. D. MUNN,
Attorneys for Respondent.

EXHIBIT "A."

An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis.

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company be and is hereby granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line with all necessary tracks for turnouts, side-tracks and switches, in such streets of said city as the City Council may deem suited to street railways, subject to the terms, conditions and forfeitures hereinafter contained.

Provided, That the City Council reserves the right to limit the said company to the construction of a single track upon such street or streets as it may deem proper.

SECTION 2. The aforesaid grant is upon the express con-
159 dition that within four months from the passage of this ordinance the said company shall construct and put in operation a line of railway extending from the St. Paul and Pacific railroad crossing on Fourth avenue north, W. D. along Washington avenue to Hennepin avenue; thence on Hennepin avenue to and across suspension bridge and Nicollet island, up Central avenue, E. D. to Fourth street, and down Fourth street to Fourteenth avenue S. E. D.

And provided, that within one year thereafter the said company shall construct and put in operation a line from Plymouth avenue in the West Division, along Washington avenue to its intersection with the line at the St. Paul and Pacific depot on said Washington avenue.

And also a line from Hennepin avenue along Washington avenue to Twelfth avenue south, and thence on the most practical route to Franklin avenue.

And that the line from Plymouth avenue north to Franklin avenue south shall be constructed as one line.

And provided further, There shall be no forfeiture by reason of delay in completing the first line on account of the inability of said company to do within the said four months because of the said bridges not being built or repaired suited to receive the railway.

SECTION 3. The City Council may at any time designate any other line of railway in the said city as a line demanded by the public necessities, and may also designate an extension of any existing line or lines.

And in case said company, upon being notified of such designation, shall not within such reasonable time as shall be fixed by the City Council, construct and put in operation such line, then the City

Council may charter to any other company the exclusive
160 right to construct and operate a street railway in the street or streets so designated.

And in case the said Minneapolis Street Railway Company shall at any time neglect to keep in operation any line of railway which it may have constructed, then upon such reasonable notice as the City Council may prescribe, said company shall forfeit the exclusive right herein granted, so far as the same pertains to such neglected line.

And the City Council may grant the exclusive right to any other person or company to build and operate a street railroad upon such neglected line.

Provided, That said company shall, if required by the City Council, after being notified in writing by the city attorney, remove or cause to be removed, the track and other materials of such neglected line within ten days after the service of said notice upon the president or secretary of said company.

SECTION 4. The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as the said company deem advisable.

Provided, That no propelling power or machinery of any sort shall be used after it shall prove to be a public nuisance.

And said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council.

But no locomotive, freight or passenger car, such as are usually run over the general railways of this state for the transportation of freight and passengers, shall be used upon any of said tracks unless authorized by the City Council.

161 Provided, That the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under section 3 of this ordinance, shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by the said companies or as may be determined by the district court of Hennepin county.

SECTION 5. Said tracks and railways shall be used for the purpose of transporting passengers and freight and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities.

Provided, Said company shall at all times have the right to use their track for transporting iron, ties and other material for constructing their road and keeping the same in repair, and such other purposes as from time to time may be necessary in carrying out any contract or engagement that may be hereafter entered into by and between the City of Minneapolis and said company.

SECTION 6. The track of such railway shall be laid so as to conform with the established grades of the streets on which the road may be built, whenever the same may have been graded by the city.

But whenever the city shall change the grade of any street or streets, or any portion thereof, the said company shall raise or lower the track so as to conform to such change of grade.

Where the streets are not graded to an established grade said company shall lay their tracks so as to conform to the surface of such streets.

Provided, That they raise or lower the same to the grade
162 when the city shall grade the same, or any part thereof.

And in case said city shall at any time pave or otherwise improve the surface of any street along which said railway may run, said company shall pave or otherwise improve the space between the rails of their tracks, unless otherwise provided by the City Council, so that it shall substantially correspond to the improvement of the street outside of the tracks.

Except in case pneumatic power is used, when the company shall be required to pay only so much of the expenses of paving the street as is made extra by reason of said railway.

Provided, Said company shall plank the space between the tracks and on both sides thereof at each street crossing whenever required by the street commissioner.

And one plank shall be laid on the outside of each rail, and on the inside, when it shall be ordered by the City Council.

And provided further, That the City Council hereby reserves the right to designate the style of rail to be laid by said company through the streets of the city.

SECTION 7. The said City of Minneapolis shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or from any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or from the improvement or repair of any street, unless there be unreasonable delay in making such repairs.

The City of Minneapolis hereby reserves the right to take up and remove the rails of said road whenever it shall be necessary
163 for the repair or improvement of the streets or for laying water or gas pipes or sewers, or for other public purposes, on the streets of which such rails may be laid.

And such repairs or improvements or works shall be made by the city without unnecessary delay.

And the track of said road shall be taken up and relaid by and at the cost and expense of said company, whenever the Council may require the same to be done.

SECTION 8. The said company may regulate and establish and regulate the rate to be charged by the said companies, their successors and assigns, for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance and every five years thereafter, fixing the same at such rates as the City Council of said city may deem just and reasonable.

Provided, That the city shall not reduce the passengers' fare below five cents over any one continuous line.

And what shall be considered a continuous line may be designated by the City Council of the said city.

But the said Council shall not designate any such continuous line to be more than three miles in length.

SECTION 9. The Council of the City of Minneapolis hereby reserves the right to make all necessary and usual police regulations

concerning the operation and management of said street roads during the continuance of the rights and privileges hereby granted.

SECTION 10. Said tracks shall be laid in the center of the street in all cases where it is practicable to so lay them.

And said tracks shall not be laid within twelve feet of the
164 sidewalk upon any street in any case where it is practicable to be avoided.

And said company shall keep the space between the rails in proper repair so as not to interfere with travel over the same.

And shall keep the same in proper order as to cleanliness, at its own cost and expense.

SECTION 11. The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to such car.

Nor shall any person wilfully obstruct, hinder or interfere with any of said railway cars by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle or other obstacle, in, upon, across, along, or near the tracks of said railway, or either of them, after being notified by the driver or conductor, by the ringing of the car bell, or otherwise.

And whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof before the municipal court of said city, be punished by a fine of not more than fifty nor less than five dollars and costs of prosecution, and may be imprisoned until such fine and costs are paid, not exceeding thirty days.

SECTION 12. It shall be the duty of the company to furnish and run a sufficient number of cars to accommodate the traveling public on all streets which they shall use and occupy for railway purposes.

All cars shall carry signal lights after dark.

SECTION 13. It shall be the duty of said company to repair any and all damages done to the streets, curbs, sidewalks, gutters, or other public property by the construction or repairing of the
165 tracks along the streets, as herein provided for.

And further, to protect and save harmless the City of Minneapolis against claims or damages arising from the construction or management of tracks and roads provided for herein.

SECTION 14. Authority is hereby conferred on and said company is hereby required to lay double tracks over and across such bridges as may be on any of the streets occupied by them, when so required by the City Council.

Said tracks on said bridges to be laid in such manner as the committee on roads and bridges shall authorize and direct.

SECTION 15. The said Minneapolis Street Railway Company is hereby obligated to make such equitable and mutual terms (as the Councils of St. Paul and Minneapolis may determine) with the Street Railway Company of St. Paul, or such other company as may have the right to operate the street railway in St. Paul, as shall allow each of two said companies to run their cars into the business centers of each of said cities, over the tracks of each other without change of cars between the two cities.

SECTION 16. The cars or carriages of the company shall be run

upon and along the tracks of said railway company in conformity with the following rules and regulations:

Provided, That nothing herein contained shall be construed as limiting the police powers of the City Council as granted in section 9 of this ordinance, to-wit:

First. No car shall be run at a greater speed than six miles per hour.

Second. While cars are turning corners or crossing bridges,
166 the horses or mules attached thereto shall not be driven faster than a walk; or if other motive power is used, not faster than three miles an hour.

Third. Cars driven in the same direction shall not approach each other nearer than a distance of two hundred feet except in cases of unavoidable necessity or accident or when cars are near or at stations.

Fourth. No cars shall be left to remain standing on any street at any time unless the same is waiting for passengers, or is unavoidably detained.

Fifth. No car shall be allowed to stop on a cross walk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the streets or take in or leave off passengers.

Sixth. The conductors and employees employed by said company shall use all reasonable care and diligence to prevent injury to persons, and on the appearance of danger to anyone on or near the track, the car shall be stopped, when by so doing such injury may be averted.

Seventh. All proper care shall be used by conductors and employees to prevent injury to teams, wagons, carriages and other vehicles.

Eighth. The conductor shall use proper diligence to prevent ladies or children under twelve years of age from leaving or entering the car while in motion.

Ninth. Conductors shall announce to passengers in a distinct tone the names of all streets crossed as the cars approach such cross streets, and they shall observe the same rule when nearing the track of any other railroad company.

Tenth. No cars shall remain standing at any of the stations more than ten minutes, except at each end of the lines and the
167 stations nearest the passenger depots of any other railway companies, at which excepted stations they may stand a longer time.

SECTION 17. Within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations and limitations above expressed, signed by the president and secretary of said company.

And when so accepted the ordinance shall operate as a contract between the city and said company.

And upon failure to file such acceptance as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever.

SECTION 18. This ordinance shall take effect and be in force from and after its publication.

Passed July 9th, 1875.

W. E. JONES,
President of the Council.

Attest:
FRANK J. MEAD,
City Clerk.

Approved July 17th, 1875.

O. C. MERRIMAN, *Mayor.*

EXHIBIT "B."

Legislative Act.

An Act to Confirm the Grant of the City of Minneapolis to the Minneapolis Street Railway Company.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whereas, the City of Minneapolis did, by an ordinance entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," passed by the City
168 Council of said city on the ninth (9th) day of July, one thousand eight hundred and seventy-five (1875), and approved by the mayor of said city on the seventeenth (17th) day of July, one thousand eight hundred and seventy-five (1875), and by an ordinance passed July third (3d), one thousand eight hundred and seventy-eight (1878), and amended July eighth (8th), one thousand eight hundred and seventy-eight (1878), and approved July tenth (10th), one thousand eight hundred and seventy-eight (1878), grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of said city, with certain rights and privileges in said ordinance particularly set forth. Now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said company.

SECTION 2. This act shall take effect and be in force from and after its passage.

J. B. WAKEFIELD,
President of the Senate.
C. A. GILMAN,
Speaker of the House of Representatives.

Approved this 4th day of March, A. D. one thousand eight hundred and seventy-nine (1879).

J. S. PILLSBURY, *Governor.*

Exhibit "C."

An Ordinance

Amending an ordinance entitled: "An ordinance authorizing the Minneapolis Street Railway Company to construct and
169 maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890.

The City Council of the City of Minneapolis do ordain as follows:

Section 1. That section six (6) of the above entitled ordinance be and the same is hereby amended to read as follows, to-wit:

Passenger cars on said lines shall run between extreme limits, on extensions to or near the intersection of Hennepin and Nicollet avenues without change to one full fare, which transfer shall entitle the passenger — passengers traveling thereon; and the said company shall establish and maintain a transfer depot or building at some point on Hennepin avenue between the Union depot and Washington avenue, which shall be heated and lighted, and kept in suitable condition for the accommodation of its patrons. It shall also establish three additional transfer points as follows: One at the corner of Cedar avenue and Washington avenue; one at Twentieth avenue north and Washington avenue, and one at Second (2d) street northeast and Central avenue, at which points it shall issue a transfer to any passenger on any of said lines, who shall pay so receiving the same to a continuous passage on connecting lines at the places above mentioned, provided that no passenger shall be entitled to more than one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on connecting line on which it is to be used—provided said company shall not be required to issue transfers to or from interurban cars now operated, or that may be
170 hereafter operated between the cities of Minneapolis and St. Paul.

Should the city provide land for the transfer depot, the said company shall build the transfer depot at an expense of not less than five thousand (5,000) dollars, which shall be heated and lighted, and kept in a first-class manner for the convenience of the public.

The sum of one thousand (1,000) dollars shall be paid to the city annually for the use of said land. Should the depot be built on land provided for by the city, said company shall be allowed to relocate its main line of tracks, so as to run a single line of track on each side of the depot, thence connecting with the present main line.

The platform of such depot shall be of such height that the passengers can step from it to the platform of the car; the said company shall provide attendants who shall assist people in getting on and off cars, and give information desired.

Open cars of the most approved pattern shall be provided and operated during the summer months on all of the lines.

Sewers shall be built in all streets before new lines shall be ordered, or existing lines shall be ordered extended thereon, and said company shall only be required to construct the line so ordered between the first of April and the first of November.

SECTION 2. This ordinance shall take effect and be in force from and after February 1st, 1893, provided it is accepted by the street railway company within ten (10) days after its passage.

Passed Nov. 25th, 1892.

E. G. POTTER,
President of the Council.

Approved Nov. 26th, 1892.

E. G. POTTER,
Acting Mayor.

Attest:

CHAS. F. HANEY,
City Clerk.

171 EXHIBIT "D."

To the City Council of the City of Minneapolis.

GENTLEMEN: The board of directors of the Minneapolis Street Railway Company having, at a special meeting thereof, duly called and held, on the 29th day of November, 1892, by a resolution, duly adopted, accepted the ordinance passed by the City Council of the City of Minneapolis, on the 25th day of November, 1892, and approved on the 26th day of November, 1892, and duly published on the 29th day of November, 1892, a copy of which said ordinance appears at length in the certified copy of said resolution hereto attached and herewith filed, and the said company in and by said resolution, having authorized me to sign an acceptance, in writing, of said ordinance, for and on behalf of said Minneapolis Street Railway Company, and to file the same, with the city clerk of said city, I do, pursuant to said resolution, and authority, hereby, for and on behalf of the Minneapolis Street Railway Company, accept said ordinance and the provisions and conditions thereof, as therein contained and set forth.

In witness whereof, I have hereunto subscribed the name of the Minneapolis Street Railway Company, and affixed its corporate seal, this 29th day of November, 1892, as authorized by said resolution.

THE MINNEAPOLIS STREET RAILWAY CO.,
By C. G. GOODRICH,
Vice-President.

[CORPORATE SEAL.]

EXHIBIT "E."

An Ordinance

Amending an ordinance entitled: "An ordinance authorizing the Minneapolis Street Railway Co. to construct and maintain
172 tracks, and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892.

The City Council of the City of Minneapolis do ordain as follows: SECTION 1. That section six (6) of an ordinance entitled: "An ordinance authorizing the Minneapolis Street Railway Co. to construct and maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22d, 1890, as amended by an ordinance passed November 26th,1892, be and hereby is amended so as to read as follows:

"Passenger cars on said lines shall run between extreme limits on extensions to or near the intersection of Hennepin and Nicollet avenues, without change to passengers traveling thereon; and the said company shall establish and maintain a central transfer station or building at some point on Hennepin avenue between the Union depot and Washington avenue, which shall be heated and lighted and kept in a suitable condition for the accommodation of its patrons, which said central transfer station or building shall be constructed and put in operation not later than May 1st, 1893. It shall also establish five additional transfer points, as follows: One at the corner of Cedar avenue and Washington avenue; one at Twentieth avenue north and Washington avenue; one at Second street northeast and Central avenue; one at Washington avenue and First avenue south, and one at the corner of Oak street and Washington avenue southeast, at which points it shall issue a transfer to any passenger, on any said
173 lines, who shall pay one full fare; which transfer shall entitle the passenger so receiving the same to a continuous passage on connecting lines at the places above mentioned, provided that no passenger shall be entitled to more than one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage, and shall be used on the next car departing on the connecting line on which it is to be used; but said company shall not be required to issue transfers for through travel to or from the interurban cars now operated, or that may hereafter be operated between the cities of Minneapolis and St. Paul; provided that transfers for local transportation shall be issued to and from interurban cars to all persons using said cars for local travel—the company, however, having the right in lieu of giving such transfers to and from interurban cars to operate local cars along said line with the same transfer privileges as on other lines, the same to be run with such frequency as will reasonably accommodate the local travel thereon, and not more than ten (10) minutes apart, and all

interurban cars to continue to stop at the same number of crossings as at present, and at such other crossings as the Council shall hereafter direct.

If any of the cars operated upon any of the present existing lines of said street railway shall not run to said central transfer station or building, transfer checks shall be given to and from such cars at the connecting point nearest thereto.

Should the city provide land for the central transfer station or building, the said company shall build said central transfer station or building at an expense of not less than five thousand
174 (5,000) dollars, which shall be heated and lighted and kept in first-class manner for the convenience of the public.

The sum of one thousand (1,000) dollars shall be paid to the city annually for the use of said land. Should the central transfer station or building be built on land provided for by the city, said company shall be allowed to re-locate its main line of tracks, so as to run a single line of track on each side of the central transfer station or building, thence connecting with the present main line.

The platform of such central transfer station or building shall be of such height that the passengers can step from it to the platform of the car. The said company shall provide attendants, who shall assist people in getting on and off cars, and give information desired.

Open cars of the most approved pattern shall be provided and operated during the summer months on all of the lines.

Sewers shall be built in all streets before new lines shall be ordered, or existing lines shall be ordered extended thereon, and said company shall only be required to construct the lines so ordered between the first of April and the first of November.

SECTION 2. This ordinance shall take effect and be in force from and after its publication, and acceptance by the Minneapolis Street Railway Co., which acceptance shall be made and filed within thirty (30) days after the passage of this ordinance.

Passed December 23d, 1892.

E. G. POTTER,
President of the Council.

Approved December 29th, 1892.

P. B. WINSTON, *Mayor.*

Attest:
CHAS. F. HANEY,
City Clerk.

175 EXHIBIT "F."

To the City Council of the City of Minneapolis.

GENTLEMEN: The board of directors of the Minneapolis Street Railway Company having, at a special meeting thereof duly called and held on the 2d day of January, 1893, by a resolution duly adopted, accepted the ordinance passed by the City Council of the City of Minneapolis on the 23d day of December, 1892, and approved

on the 29th day of December, 1892, and duly published on the 31st day of December, 1892, a copy of which said ordinance appears at length in the certified copy of said resolution hereto attached and herewith filed, and the said company, in and by said resolution, having authorized me to sign an acceptance in writing of said ordinance for and on behalf of said Minneapolis Street Railway Co., and to file the same with the city clerk of said city, I do, pursuant to said resolution and authority, hereby, for and on behalf of the Minneapolis Street Railway Company, accept said ordinance and the provisions and conditions thereof, as therein contained and set forth.

In witness whereof, I have hereunto subscribed the name of the Minneapolis Street Railway Company and affixed its corporate seal this 2d day of January, 1893, as authorized by said resolution.

[CORPORATE SEAL.] THOMAS LOWRY, *President.*

STATE OF MINNESOTA,
County of Hennepin, ss:

J. F. Calderwood came personally before me and, being duly sworn, doth depose and say that he is the secretary of the Minneapolis Street Railway Company, the respondent in the above entitled proceeding; that the foregoing answer and return is true of his
176 own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

J. F. CALDERWOOD.

Subscribed and sworn to before me this 9th day of December, A. D. 1893.

[NOTARIAL SEAL.] WILL A. KOON,
Notary Public, Hennepin County, Minn.

177 EXHIBIT "D."

STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

THE STATE OF MINNESOTA on Relation of THE CITY OF MINNEAPOLIS, Relator,
vs.
THE MINNEAPOLIS STREET RAILWAY COMPANY, Respondent.

Findings.

This cause was brought on for trial before the said court on Monday, the 29th day of January, A. D. 1894, upon the alternative writ of mandamus and the respondent's answer and return thereto, David F. Simpson, Esq., city attorney, Messrs. Brooks & Hendrix and

Messrs. Hale & Morgan appearing as attorneys for said relator, and Messrs. Koon, Whelan & Bennett, and M. D. Munn, Esq., appearing for said respondent; and from the admissions contained in the pleadings and the evidence adduced the following facts are found:

First. That the relator, the City of Minneapolis, is, and at all times herein referred to was, a municipal corporation, duly created, organized and existing under and by virtue of its charter heretofore granted by the legislature of said state, which charter is a public and general act and statute of said state not necessary to be pleaded or proved in any case. That during all of said times said charter of said city did contain, and does now contain, among
178 other provisions the following, viz., that said city by its corporate name of the City of Minneapolis, "shall be capable of contracting and being contracted with, and shall have all the general powers possessed by municipal corporations at common law."

And also the following provisions concerning the powers of the City Council of said city:

CHAP. VIII, SEC. 1. "The City Council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city, and may lay out and open new streets and alleys, and extend, widen and straighten any that now exist, or which may hereafter exist."

CHAP. IV, SEC. 5. "The City Council shall have full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient, and in and by the same to declare and impose penalties and punishments, and enforce the same against any person or persons who may violate the provisions of any ordinance, passed and ordained by it, and all such ordinances are hereby declared to be and to have the force of law. Provided, That they be not repugnant to the laws of the United States or of this state; and for these purposes the said City Council shall have authority, by such ordinances:

Sixth. To prevent the encumbering of streets, sidewalks,
179 alleys, lanes, public grounds or wharfs, with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings, or any other materials or substances whatever:

Thirty-first. To remove and abate any nuisance, obstruction or encroachment upon the streets, alleys, public grounds and highways of the city.

Thirty-fourth. To license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight, and to regulate their charges therefor:

Forty-second. To regulate and control, or prohibit the placing of poles therefor, and the suspending of electric and other wires, along or across the streets of said city, and to require any or all already placed or suspended, either in limited districts, or throughout the entire city, to be removed or to be placed in such manner as it may designate beneath the surface of the street or sidewalk."

That said City of Minneapolis has at no time had any power or authority to enter into or become a party to any contract with said

respondent, the Minneapolis Street Railway Company, except such power and authority *are* conferred or given by the provisions of its said charter hereinbefore set forth, or by the act of which "Exhibit B" of said answer is a copy.

Second. That said respondent, the Minneapolis Street Railway Company, during all of said time was, and now is, a corporation of said state duly organized and created under the general laws thereof and that said respondent, as such corporation, has acquired and has such authority, right or license to construct, maintain and
180 operate street railways within said city as was, or has been, given, conferred or granted by the ordinances and resolutions hereinafter mentioned or set forth, and by the act of the legislature of Minnesota, a copy whereof is attached to the answer of said respondent and marked "Exhibit B." And said respondent has not acquired, and does not now have any right, authority or license to construct, maintain or operate any line or lines of street railway within said city, except as the same was acquired under, and by virtue of the resolutions, ordinances and act aforesaid.

Third. That the said Minneapolis Street Railway, through its president, Thomas Lowry, addressed and presented to the City Council of said city the written communication set forth in the 6th paragraph of said writ; and each and all of the resolutions and ordinances alleged and set forth in said writ and answer or attached as exhibits to said answer, including the ordinance set forth in full in the 5th finding of fact herein, were duly and legally made, passed, adopted, signed and published in the manner alleged and each thereof upon its publication became valid, binding and enforceable so far, and so far only, as said city had authority and power under the provisions of its said charter hereinbefore set forth, to make, pass, ordain or adopt the same. And the said statute of which said "Exhibit B" is a copy was duly enacted and passed in the words of said exhibit by the legislature of said state, and was thereupon duly approved in the year and upon the day in said answer alleged.

Fourth. That on the 10th day of July, 1878, the said City of Minneapolis duly made, adopted and passed its certain ordi-
181 nance entitled: "An ordinance authorizing the Minneapolis Street Railway Company to construct a street railway on certain streets and avenues of the City of Minneapolis," which ordinance after being duly passed by the City Council of said city was on said last mentioned day duly approved by the mayor thereof and was thereupon duly published and was in the words and figures following, to-wit:

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That the Minneapolis Street Railway Company, its successors and assigns, are hereby authorized to construct and maintain a street railway line upon and over the following named streets and avenues in the City of Minneapolis, viz.: Commencing at the intersection of Nicollet avenue with First street, running thence upon First street to First avenue south; thence upon First avenue south to Thirteenth street; thence upon Thirteenth street to Nicollet avenue, and thence upon Nicollet avenue to the southern limits of the city.

With all the turnouts, switches, turn-tables and other appurtenances which may be convenient, and to operate such line of railway with animal, steam or other power. Provided, however, that the City Council of said city shall have the right at any time to prohibit the use of steam upon any part of said line wherever it shall deem the public good will be subserved by such prohibition. Provided, further, that said line of street railway shall be completed in one year from the first day of July, A. D. 1878.

SECTION 2. That the Minneapolis Street Railway Com-
182 pany, its successors and assigns, in the construction, maintenance and operation of said line of street railway shall at all times be subject to all the conditions, limitations and other provisions of an ordinance of said city, entitled "An ordinance authorizing and regulating street railways in the City of Minneapolis," passed July 9, 1875. And, the City Council and city government shall have all powers respecting said street railway line which *is* retained under the provisions of said ordinance with reference to the lines of railway mentioned therein.

SECTION 3. This ordinance shall take effect and be in force from and after its publication.

And that on the 8th day of April, 1892, said City Council duly passed and adopted a certain other ordinance entitled:

"An ordinance requiring the Minneapolis Street Railway Company to issue transfer checks on its street railway lines in the City of Minneapolis, and providing penalties for its failure to do so," which ordinance was thereupon and on the 11th day of said last mentioned month duly approved by the mayor of said city, and was thereupon duly published and was in the words and figures following, to-wit:

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. Said Street Railway Company shall issue transfer checks at the junction of its street railway lines in said city at Washington and Hennepin avenues in said city, to any passenger on any
of said lines who shall pay one full fare, which transfer check
183 shall entitle the passenger so receiving the same, to a continuous passage on either of said connecting lines; provided, that no passenger shall be entitled to more than one transfer check for one fare; and provided, further, that such transfer check shall be used only by the person receiving the same for a continuous passage, and shall be used upon the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues. And such transfer checks shall be issued and given to travelers on all lines of said street railway company in the City of Minneapolis, at all junctions and intersections made by said lines of railway in the said city, as the same now exists or hereafter may be established, which transfer check shall so entitle a passenger to a continuous passage on the line so intersected or connected with.

SECTION 2. Said Street Railway Company shall forfeit to the City

of Minneapolis the sum of fifty dollars ($50.00) for each time it refuses so to issue a transfer check, and for each time it refuses to honor the same, by carrying any passenger so entitled thereto, on any such connecting line.

The penalties herein provided for may be recovered in a civil action or actions brought by said city against said street rail-
184 way company, in the municipal court of the City of Minneapolis.

SECTION 3. This act shall take effect and be in force from and after its publication.

Fifth. That the ordinance referred to in the allegations of said writ, in the 8th paragraph thereof, from and including the words "That thereafter and on the 14th day of July, 1893," to the end of said paragraph and in part set forth therein has at all times since its adoption remained in full force and effect and was, and is, in the words and figures following, to-wit:

An ordinance amending an ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22nd, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892, and as further amended by an ordinance passed December 23rd, 1892, and approved December 29th, 1892.

Whereas, The provisions regulating the transfer of passengers on the lines of the Minneapolis Street Railway Company, as contained in an ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," passed September 19th, 1890, and approved September 22nd, 1890, as amended by an ordinance passed November 25th, 1892, and approved November 26th, 1892, and further amended by an
185 ordinance passed December 23rd, 1892, and approved December 29th, 1892, are in their practical operation, oppressive, unreasonable, and a burden and hardship on the public. Now, therefore

The City Council of the City of Minneapolis do ordain as follows:

SECTION 1. That section six (6) of an ordinance entitled "An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity," passed Sept. 19th, 1890, and approved Sept. 22nd, 1890, as amended by an ordinance passed Nov. 25th, 1892, and approved Nov. 26th, 1892, and as further amended by an ordinance passed December 23rd, 1892, and approved December 29th, 1892, be and hereby is amended so as to read as follows:

"Passenger cars on said lines shall run between extreme limits on extensions to or near the intersection of Hennepin and Nicollet avenues, without change to passengers traveling thereon; and said street railway company shall deliver, at the junction or intersection of any

of its lines within the City of Minneapolis a transfer to any passenger demanding the same and who shall pay one full fare, which transfer shall entitle the passenger so receiving the same to a continuous passage on the line so intersected, joined or connected with; said transfer shall be issued to said passenger by the conductor or other agent of said company and from and upon the car on which
186 said passenger has paid his full fare; provided, that no passenger shall be entitled to more that one transfer for one fare, and provided that the transfer shall be used only by the person receiving the same for a continuous passage and shall be used on the next car departing on the connecting or intersecting line on which it is to be used; but said company shall not be required to issue transfers for through travel to or from the interurban cars now operated between the cities of Minneapolis and St. Paul; provided that transfers for local transportation shall be issued to and from interurban cars to all persons using said cars for local travel. All interurban cars shall continue to stop at the same number of crossings as the council shall hereafter direct.

If any of the railway lines of said company do not intersect or connect with all the lines of said company in said city, then transfers shall be issued, in the manner hereinbefore set forth, from the cars operated on said non-intersecting and non-connecting lines to such other lines at the point where said cars nearest approach the intersection of Washington and Hennepin avenues in said city.

Open cars of the most approved pattern shall be provided and operated during the summer months on all the lines.

SECTION 2. This ordinance shall take effect and be in force from and after its publication."

Sixth. That except as herein stated all of the resolutions and ordinances so adopted and passed by said city, and the terms,
187 conditions and stipulations of each thereof were accepted by said respondent and the acceptance of each thereof filed with the city clerk of said city as alleged; and that upon the acceptance by the board of directors of said respondent corporation of each of the resolutions set out in said writ and of the ordinance first referred to in the 8th paragraph thereof said board determined and declared it to be for the best interest of said respondent corporation to accept the same.

Seventh. That said respondent corporation has not at any time filed with the city clerk of said city an acceptance of the grants made, or attempted to be made, in said ordinance of which "Exhibit A" of the answer is a copy, as provided in Section 17 of said ordinance or otherwise. And said respondent has at no time accepted said last mentioned ordinance or any grant in said ordinance made, or attempted to be made, or any of the conditions, regulations or limitations therein expressed, except as such acceptance is to be implied or inferred from the construction, maintenance and the operation by the respondent of its lines of street railway upon the streets of said city as herein stated.

Eighth. That said respondent has not at any time accepted either of the ordinances set forth in the above 4th finding of fact or the

ordinance contained and set out in above 5th finding or accepted any of the conditions, stipulations, regulations or requirements in either or any of said ordinances contained, except as such acceptance is to be implied or inferred from the continued construction, maintenance or operation of its lines of railway as herein shown.

Ninth. That between July 17th, 1875, and July 19th, 1889, said respondent constructed upon the streets of said city desig-
188 nated by its City Council lines of street railway and the necessary tracks and other appliances suitable and adapted for the operation thereon of cars propelled by animal power; and did between said days operate upon said lines streets railway cars propelled by such power. And from and after the adoption of said ordinance first set forth in the above 4th finding of fact and until July 19th, 1889, said respondent maintained upon the streets in said ordinance designated a street railway operated by steam power. But respondent did not until after said last mentioned date construct or maintain within said city any line of street railway which was operated by or which was intended or was suitable to be operated by or with electricity as the motive power.

Tenth. That on said 19th day of July, 1889, said respondent was operating within said city and upon the streets thereof 87 11-100 miles of street railway which had theretofore been constructed and which was then operated by animal or steam power as aforesaid, and that upon the adoption of said resolutions passed as aforesaid on said day, said respondent began preparations for the construction of the proposed cable lines designated therein and also began the construction of a certain other proposed cable line of like character on First avenue south in said city.

That between said July 19th, 1889, and January 11th, 1890, respondent constructed an experimental electric street railway line upon Fourth avenue south in said city and the same having proved to be a practical success said City Council did, upon receipt of the communication set out in the 6th paragraph of said writ, adopt the resolution in said paragraph set forth and did thereafter
189 also adopt and pass the ordinance in the 8th paragraph of said answer set forth.

That between said July 19th, 1889, and January 1st, 1892, said respondent took up and wholly removed all of its said street railway tracks in said city and all of its cars and other appliances and appurtenances used or employed in the operation of its lines by animal or steam power, and since January 1st, 1892, has wholly ceased to use any of its said tracks, cars or other appurtenances so taken up and removed as aforesaid.

That since July 19th, 1889, under and by virtue of the authority, right or permission conferred and given by the resolutions and ordinance in this finding referred to, respondent has constructed other lines of street railway within said city, some upon the same streets and parts thereof from which its previous lines or tracks had been removed as aforesaid, and some upon other streets and avenues of said city upon which no street railway had theretofore been constructed, operated or maintained. That in the construction of said

new lines of street railway respondent laid within and upon the streets new tracks and placed thereon new cars wholly different in design from those theretofore used, and erected and placed within and over the streets the poles, wires and conduits and other appurtenances and appliances necessary to the operation of its cars upon such newly laid tracks by and with electricity as a motive power applied by what is commonly called and designated the "trolley system." That prior to August 3rd, 1893, respondent had so constructed and equipped 116 367-1000 miles of electric street railway lines within said city and had placed within the streets the
190 poles, wires and conduits necessary to the operation of the said newly constructed lines by the system aforesaid and in so doing had expended more than $2,000,000. And that since January 1st, 1892, respondent has operated and does now operate all lines of street railway within said city by and with electric power applied by means of said "trolley system," as in these findings stated and shown. But respondent has not in any manner obtained from said city or state any right or permission to construct, maintain or operate electric lines upon any street of said city except as in these findings stated and shown.

Eleventh. That electricity was not within the State of Minnesota or elsewhere practically applied or used as a motive power in the propulsion or operation of street cars until the year 1886. That the "trolley system" now used by respondent in the operation of its said lines first came into practical use and was first known in said last mentioned year. That in the operation and use of said system said respondent was compelled to and did upon all its said lines, except its Fourth avenue line, place and maintain, and does still maintain, in the center of each and every street and avenue upon which any of its electric lines are located, iron poles not less than six inches in diameter or less than eighteen feet in heighth, which poles are so placed and maintained 125 feet apart and are firmly imbedded in an upright position in the soil of said street. That upon each of said poles and eighteen feet from the ground is an arm or cross-piece ten feet in length to which three wires are attached which are stretched and suspended over the street longitudinally the full length of the line and from which the electric current passes down the trolley pole
191 reaching upwards from each car. That said poles, cross-pieces and wires remain permanently in the street and are an obstruction thereon. That said electric line on Fourth avenue south is constructed in like manner except that the poles are of wood and are placed within the street upon each side thereof, wires being stretched therefrom from pole to pole across the street to which the longitudinal wires above mentioned are fastened and attached.

Twelfth. That the two street railway lines referred to in the first paragraph of the resolution set out in the 6th paragraph of said writ and which were by said resolution substituted for cable lines theretofore authorized, as therein shown, to-wit, the lines on Washington avenue and First avenue south were fully completed prior to November 1st, 1890, and have at all times since said day been by said respondent operated and maintained.

Thirteenth. That not more than 56.94 miles of the electric lines of street railway now operated by said respondent within said city are within the corporate limits thereof, as the same were prior to the year 1881, and no part of any line now operated by said respondent is upon or within the streets or avenues or parts thereof designated in the ordinance first set forth in the above 4th finding of fact, except a portion of the line of First avenue south, between High street and Grant street, and except also the line on Nicollet avenue from said Grant street to Twenty-fourth street south.

Fourteenth. That all lines of street railway now existing or in operation within said city were existing and in operation as the same now are, since a time prior to the adoption of the ordinance
192 set forth in the above 5th finding of fact; and one or more of said lines of street railway intersect, join and connect with one or more other lines thereof at all points designated and named in the 9th paragraph of said writ, except at the point in Hennepin avenue between Twenty-ninth and Thirtieth streets, except also, at the intersection of Cedar avenue and Thirty-second street and except also at the intersection of Bloomington avenue and Thirty-second street.

That hereto attached and marked "Exhibit X" is a true map and plat of said city correctly drawn upon a scale of three thousand feet to one inch. That the lines thereon marked as follows —o—o—o— bound the territory within the outer limits of said city as the same now are, and the blue lines thereon mark the territory within the outer limits of the city as the same were prior to the year 1881; that the black right lines upon said plat and also the line extending southwesterly from the intersection of Hennepin avenue and Thirty-first street, ending in a loop near Lake Harriet, as shown thereon, truly represent the location and course of the various lines of street railway within said city and the various points at which said lines connect, intersect or join, and also the street or avenues upon which each of said lines is located, operated and run.

That the numbers written upon said plat in red ink truly show the number of feet of distance between different points as follows, viz.: When written between the blue line and the nearest point where any of said street railway lines connect, the same shows the distance in feet between such point of connection and the outer limits of said city as the same were prior to the year 1881; when written
193 between said blue line and the end of any line of street railway, where no intersecting or connecting point intervenes, the same shows the distance in feet between said former limits and the extremity of said line; when written between any connecting point and the point where any line of street railway terminates, said points being both within or without said former city limits, the same shows the true distance in feet between said points, and in all other places the same shows the number of feet of distance between the two nearest points where said lines of street railway connect, intersect or join.

Fifteenth. That each of the lines of street railway represented upon said plat "Exhibit X," is now in actual operation and cars are regularly run each day thereon, each of which is under the charge, care and control of a conductor employed and placed thereon by said respondent; and that each of said streets and avenues upon

which any of said lines are operated as aforesaid is, and for many years has been, a public street and highway of said city, much traveled by the inhabitants thereof and others having occasion to use the same.

Sixteenth. That said respondent through its conductors upon its cars has heretofore delivered, and does now deliver, from and upon its said cars to any passenger thereon demanding the same and paying one full fare a transfer, according to the requirements of the ordinance set forth in said 5th finding of fact, at each of said connecting points located respectively at the intersection of the following streets and avenues, viz.: Of Washington avenue with Cedar avenue, of said Washington avenue with Plymouth avenue, of said Washington avenue with Twentieth avenue north, of Second street
194 northeast with Central avenue and of Oak street with Washington avenue. And except as aforesaid said respondent has heretofore failed and refused, and now does fail and refuse to issue or deliver to any passenger from or upon any of its cars any transfer or transfer check at any point or place within the said city.

That said respondent through an agent stationed by it upon the street has also issued and does now issue to any passenger upon the street who has left its car and paid one full fare thereon a transfer check at a point in Hennepin avenue between High street and Washington avenue, which is called the central transfer station; and also at the intersection of the following streets and avenues, viz.: Of Hennepin avenue with Washington avenue, of Hennepin avenue with Third street and of Washington avenue with First avenue south. And except as aforesaid said respondent has heretofore failed and refused, and now does fail and refuse in any manner to issue any transfer check or transfer to any passenger at any point or place in said city.

And that said respondent has heretofore failed and refused, and still does fail and refuse to allow or to give any passenger upon any of its lines a transfer to any line connecting, joining or intersecting therewith or a continuous passage thereon except upon the payment by him of an additional or extra fare or the presentation and surrender of a transfer check obtained at one of the points where transfers are issued as aforesaid.

Seventeenth. That said respondent has heretofore denied and refused, and now does deny and refuse, to its passengers upon
195 any of its cars any continuous passage or transfer privilege except upon the payment of an additional or extra fare from the Hennepin avenue line to the line on Thirty-first street south or to the Douglass avenue line or to the Lyndale avenue line or to the line on Nicollet avenue and First avenue south, from said Douglass avenue line to said Hennepin avenue line, from said Lyndale avenue line to said Hennepin avenue line, from said line on Nicollet and First avenues to said line on Thirty-first street or to said Hennepin avenue line or to said line on Fourth avenue and Third street from said last mentioned line, to said line on First avenue south and Nicollet avenue or to said line on Sixth street, Eighth avenue south and Chicago avenue, or from said last mentioned

line to said line on Fourth avenue and Third street or to the line on Bloomington avenue, Fifteenth avenue south and Seventh street south, from said last mentioned line to said line on Sixth street, Eighth avenue south and Chicago avenue or to the line on Cedar avenue or from said line on Cedar avenue to said line on Bloomington avenue.

Eighteenth. That said lines on Douglass avenue, Lyndale avenue, Hawthorn and Laurel avenues and Twelfth street, Western avenue and Seventh street and on Chicago avenue, Eighth avenue and Sixth street connect with said Hennepin avenue line as shown on said "Exhibit X," and from the point of connection cars upon each of said lines run to or near said central transfer station over and upon said Hennepin avenue; but owing to the failure and refusal of said respondent to issue transfers or allow continuous passage to its passengers to or upon connecting lines except as herein stated, a passenger upon said lines ex- — avenue line or upon any of said
196 other lines connecting therewith as aforesaid can only obtain continuous passage if at all without the payment of an additional fare to any of said other lines connecting therewith by riding upon the respondent's car to said central transfer station and back again to the point of connection, where the transfer is desired.

That said line on Nicollet avenue and First avenue south, on Chicago avenue, Eighth avenue south and Sixth street, on Bloomington avenue, Fifteenth avenue south and Seventh street south, Eighth avenue and Fourth street, on Cedar avenue and on Minnehaha avenue, Twenty-seventh street south and Riverside avenue connect with said Hennepin avenue at its intersection with High street and cars upon each of said lines pass over said High street to said Hennepin avenue and from thence to the intersection of Washington and Hennepin avenues; but owing to said failure and refusal of said respondent to issue transfers or allow continuous passage to its passengers to or upon connecting lines except as herein stated, passengers upon said last mentioned lines can only obtain continuous passage, if at all, without the payment of an additional fare to any of said other lines connecting therewith at any point south of said Hennepin avenue by riding upon respondent's car to said central transfer station and back again to the point of intersection where the transfer is desired, or to said line on Fourth avenue and Third street by riding upon respondent's car to the intersection of Hennepin avenue and Washington avenue, walking thence to the intersection of Hennepin aven-e and Third street and from thence riding back to the point of connection where the transfer is desired; and passengers upon said line on Fourth avenue and Third street can only obtain continuous passage, if at all,
197 without the payment of an additional fare to any of said lines connecting therewith south of Hennepin avenue by riding upon respondent's car to said intersection of Hennepin avenue and third street, walking thence to said intersection of Washington and Hennepin avenues and riding thence back to the point where the transfer is desired.

And that, owing to said failure and refusal of respondent to issue

transfers or allow transfer privileges to its passengers except as herein stated, passengers upon its lines can only obtain continuous passage, if at all, from said lines on Emerson avenue, Twentieth avenue north, Plymouth avenue or Washington avenue to the line of Sixth avenue north, or from said last mentioned line to any of said other lines by riding upon respondent's car from the intersection of said Washington avenue and Sixth avenue north to Hennepin avenue, walking *then* thence the distance between said Washington avenue and Third street and riding thence on respondent's car back to said point of intersection.

Nineteenth That as the mode of issuing transfer checks is now regulated by respondent as above stated, at the said central transfer station and at Hennepin avenue and Third street, Washington avenue and Hennepin avenue, and Washington avenue and First avenue south, respondent's agents appointed to issue them, are stationed in the streets, and upon the arrival of the car at the points in question, passengers entitled to transfers are required to leave the car and obtain their transfer checks from the agent, which checks are issued by him and delivered to the passenger in the street. That at the said central transfer station, several transfer agents are required
198 to do this work, all of whom are stationed in the street, some upon the sidewalk and others in the portion of the street designed for the passage of vehicles therein.

That during the months of summer and autumn, when the volume of travel over respondent's lines is greatest, there are days when its cars arrive and leave said central transfer station as often as one every minute, bringing to that point more than 1,800 passengers per hour. That large numbers of the passengers thus arriving at said station are compelled, in order to obtain the transfer checks to which they are entitled, to cross respondent's tracks, over which said cars are thus arriving and departing as above set forth, and thereby are exposed to peril and danger. That as the mode of issuing transfers is now regulated by respondent, as aforesaid, large numbers of passengers are daily and constantly compelled, in order to obtain transfers to connecting lines, to ride from the point where the line of which such passenger then is, first joins or intersects the line on and to which such passenger is entitled to and desires a transfer, to said central station, and back to the point of intersection, thus subjecting the passenger to unnecessary inconvenience and loss of time, and resulting in the crowding of respondent's cars between said points beyond what they would be were the transfer checks issued to the passenger, and he permitted to proceed on his journey from the point of intersection. That it is frequently the case that respondent's cars leaving said transfer stations, where transfers are issued as aforesaid on the street, are crowded far beyond their seating capacity, and to the extent that many passengers are compelled to stand in the aisles of the cars and even out upon the plat-
199 forms, and are thereby subjected to inconvenience and danger; and that said present mode of giving transfers contributes to produce this crowded condition of the car, with its attendant inconvenience and danger to the passengers thereon.

That said City of Minneapolis did not on or prior to the year 1875 contain a population to exceed 32,493, and since said last mentioned year its population has continually increased so that thereafter it contained the population following, to-wit: In the year 1880, 46,887; in the year 1885, 129,200; in the year 1890, 164,738; and in the month of July, 1893, and ever since said city contained and does now contain a population of not less than 200,000 inhabitants.

That the said central transfer station on Hennepin avenue between High street and Washington avenue and said transfer points on the corner of Hennepin avenue and Third street, on the corner of Washington avenue and First avenue south, and at the corner of Washington and Hennepin avenues are in the business center of said city, and the volume of travel upon the streets at these points, both by foot passengers and vehicles, is very great. That the present method of issuing transfers in the streets increases the number of people thereon at the transfer station and points aforesaid, many of whom stand in the street while the respondent's agent issues the transfer checks, and until the arrival of the next car upon the connecting line, which would be otherwise were transfers made on the cars and at the intersections of the street railway lines.

That at the intersection of Third street and Hennepin avenue, Hennepin avenue and Washington avenue, and Washington avenue and First avenue south respectively, respondent has erected
200 in the street, on the sidewalk, structures four feet or more in diameter and several feet in height for the use and shelter of its transfer agents, which structures are so used by such agents in the course of their employment.

Twentieth. That the expense of operating the railway, in compliance with the provisions of the ordinance in question will not be much, if any, greater than the expense of operating it under the present system of transferring, and it will be much more convenient for the passengers riding thereon. That this change in the transfer system, as required by said ordinance, would undoubtedly decrease the revenues of the respondent to some extent; but the proof does not show that it would so decrease its revenues that it would not be able to preserve its property and pay all of the expenses of operating its railway in a manner which would supply the public needs and leave to it a fair and reasonable compensation for the use of the capital invested; and that the regulation provided for in said ordinance is a reasonable one, not injurious to the respondent and beneficial to the public.

Conclusions of Law.

As conclusions of law the court finds that the respondent is operating its railway on certain of the streets of the City of Minneapolis, under and by virtue of a license or permit from the City Council of said city, and not by virtue of any contract between it and the city; that the city has reserved the right in the ordinance granting the license or permit, to make further ordinances in the future regulating the conduct of the respondent in the operating of its railway, and

that this ordinance in question is valid for that purpose; that
201 it is also valid as a proper and reasonable police regulation provided for by the city charter; that the relator is entitled to have the provisions of the ordinance complied with, and that it has no other adequate remedy than that by writ of mandamus, and that the relator is entitled to a peremptory writ of mandamus as prayed for, to the extent of the necessity therefor. The reasons for these conclusions are fully stated in the memorandum hereto attached, which is made a part hereof.

It is therefore ordered that judgment be entered accordingly, and that a peremptory writ of mandamus be issued out of and under the seal of this court to the respondent, commanding and requiring it to issue transfer tickets on its cars as prayed for in the petition for this writ, at all junctions and intersections of its lines of railway, except at those points where transfers are now made in the manner provided in said ordinance which are named in the findings of fact herein, and excepting also the intersection of Hennepin avenue and Twenty-ninth street, and Cedar avenue and Bloomington avenue and Thirty-second street, in said city, there being no connections at the two last named places; and for the relator's costs and disbursements herein.

February 23, 1894.

SEAGRAVE SMITH, *Judge*.

Twenty days' stay ordered.

SEAGRAVE SMITH, *Judge*.

202 *Memorandum.*

It is claimed on the part of the respondent that mandamus is not the proper remedy. By our statute a writ of mandamus may be issued to any corporation to compel the performance of an act, which the law specifically enjoins as a duty, resulting from an office, trust or station.

Gen'l Statutes 1878, Sec. 2, Chap. 20, p. 833.

When a law in force and applicable to the subject imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy the writ of mandamus is the proper remedy.

State *vs.* R. R. Co., 18 Minn. 40 (Gill. 21).

This rule is supported by a large number of authorities. The attorneys for the respondent have not cited any authority which holds, that the city had any other adequate remedy, if the ordinance attempted to be enforced is valid. It is true as claimed by respondent that the writ of mandamus is not the proper remedy to enforce contracts. Those should be enforced by proceedings in equity. The respondent claims that this ordinance in question is not a contract, as it has never been accepted or agreed to by it. If there is no legal obligation imposed by it on the respondent, then there is no right to enforce it, by any proceedings. We are of the opinion that

the writ of mandamus is the proper remedy in this case, if the city has any.

It is insisted on the part of the respondent that the ordinance in question, is invalid and cannot be enforced in any way; that the respondent, as a corporation, created and existing under the
203 laws of this state, was authorized to construct and operate a street railway, on certain streets in the City of Minneapolis, on such terms as it might agree upon with the city by resolutions and ordinances passed by the City Council and accepted and approved by the respondent, and that the city by its charter provisions was also empowered to enter into a valid contract for that purpose; that the resolutions and ordinance now in force, which had been accepted by the respondent and under which it is now operating its road, is a contract between it and the city, which cannot be modified, changed or abrogated by the city, without the consent of the respondent; that the ordinance attempted to be enforced by these proceedings, has never been accepted by it and is unauthorized and void. If this contention is correct, and the resolutions and ordinances of the city, which have been accepted by the respondent and under which it is operating its road, is a contract between it and the city, it must be conceded that the ordinance in question is invalid, as it is a direct attempt to change the contract, if it is a contract, by amending it in a material matter, unless the reservation which was retained in section eight of the ordinance of September 24, 1890, in which the city reserved the right to enact ordinances in the future regulating the use of the streets by the respondent, is valid as a proper police regulation. The law is well settled that a contract cannot be changed or abrogated without the consent of all parties to it, and any law which attempts to destroy its effect or materially alter it is void. The rule that no act or law is valid which would, if enforced, impair the obligations of a contract, is so familiar and well established that it is unnecessary to cite authorities.

204 It is claimed on the part of the city that the ordinances and resolutions under which the respondent constructed and is operating its railway, is not a contract between it and the respondent, and that the city had no power to make such a contract; that they only constitute a permit or license to use the streets for railway purposes under such reasonable regulations as the city might from time to time impose. The law is well settled that a charter or a statute by which a municipal corporation is created, is its organic act; neither the corporation nor its officers can do any act or make any contract or incur any liability, not authorized thereby; all acts beyond the scope of its powers, are void.

Dillon M. C. Sec. 55 and cases cited in notes.

The powers conferred by a charter are two kinds, legislative and contractual. The charter of the City of Minneapolis has restricted the power of the city to contract, to an unusual degree. In so far as it applies to contracts for the expenditure of moneys they are limited as to their duration and amount. They cannot, except in a few instances especially provided for, exceed in time the period

of one year, or in amount exceed the sum of moneys levied and appropriated for the purpose for which the contract was made.

See Sec. 8, 9, 10 and 15 of Ch. 5 of Charter.

In reference to the streets and highways of the city, it authorizes the city council to contract for all work or constructions made of any kind by the city.

See Sec. 5, Ch. 8 of Charter.

Section 4 of the same charter empowers the council to make a contract for cleaning streets, and section 17 of the same chap-
205 ter, authorizes it to make a three years' contract for sprinkling the same. Subdivision 11 of section 5 of chapter 4 of the charter, empowers it to make contracts for the erection of gas works, for the lighting of streets, public grounds and public buildings, and section 15 of the same chapter empowers it to purchase real estate, for the use of the city. We are unable to find any other provisions in the city charter, than those referred to, expressly authorizing the city to make contracts. It has an implied power to make contracts for governmental purposes only, subject to the restrictions in the charter referred to, and "as an essential to the declared objects and purposes of the corporation," not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

Dillon M. C. Sec. 55 and notes.

It would not be claimed, that the contractual powers expressly delegated by the charter to the City Council, would authorize it to make a contract with the respondent, for the use by it, of the public streets of the city, for street railway purposes. It cannot be said that such a contract is authorized under the head of governmental powers. It has nothing to do with the carrying on of the city government, and does not come within the range of implied powers to contract.

It is claimed by the respondent that section 1 of chapter 8 of the city charter which provides that "the City Council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city," is a sufficient authority to the City Council to contract with the respondent for the use of the streets of the city for street railway purposes, on such
206 terms as may be agreed upon by resolution or ordinance accepted by the respondent, and that a contract so made cannot be changed or abrogated by either party without the other's consent. There is no doubt but what the respondent has the power to make a contract of that kind, but as we have already shown, the city has no such power unless it is derived from said section 1 of chapter 8. We think the law is well settled that, that provision of the charter does not confer authority to contract away the right to use the streets for street railway purposes and thereby put it beyond the power of the city to regulate the use of the streets by it, in the future, except by the terms of the ordinance unless consented to by the railway company.

Dillon on M. C. Sec. 724.

Nash *vs.* Lowry, 37 Minn. 261, on p. 263.

On page 263 in the opinion of the court it is stated: "The ordinance when passed was invalid as an irrevocable contract, for it is undoubtedly the rule, in accordance with principle and authority, that a municipal corporation intrusted with power of control over public streets, cannot by contract or otherwise, irrevocably surrender any part of said power without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state.

Detroit *vs.* Detroit City Railway Co., 56 Fed. Rep. 869.

This is a well considered case and a large number of authorities are cited in the opinion of Judge Taft to sustain this position, to which reference may be had. In the case of Millhan *vs.* Shark, 27 N. Y. 611, page 622, the court says in relation to the powers of municipal corporations over its streets: "These powers are
207 given to the corporation as a trust, to be held and exercised for the benefit of the public, from time to time, as occasion might require, and they could neither be delegated to others, or effectually abridged by any act of the corporate authorities. * * * Such trust is in this respect governed by the general principle, that the duties of a trustee cannot be delegated without express power for that purpose conferred by the author of the trust." If this resolution and ordinance can be sustained as an irrevocable contract, no power would remain in the city to remove the railway from the street should it prove to be a nuisance, or to redress the rate of fare should it be too high, or to compel any improved method of conveyance at any future time should such be invented, without the consent of the respondent. The powers of the city over the streets in many other ways might be abridged.

Again, it is claimed by the respondent that the ordinance of July, 1875 and the amendments thereto made prior to the act of the legislature of 1879 validating it, was a contract between it and the city after the validating act took effect, and was in all of its terms as valid and binding on the city as if the legislature had expressly conferred the power on the city to make it, and that these subsequent resolutions and ordinances, under which it is now operating its road, are amendments to the old contract which have been agreed to by both parties, and is binding on them as a contract. If they were amendments to the old ordinance or contract they are not binding on the city, as we have already shown that the city had no power to contract away the use of the streets. They are not amendments to the original ordinance or contract and do not pretend to be.
208 They are entirely independent of, and have no relation to the old ordinance, excepting in one instance which is found in section 8 of the ordinance of September 24, 1890, where it provides "that in the construction, maintenance and operation of the lines of street railway by the respondent, it shall at all times be subject to all of the conditions and limitations of the ordinance of 1875 as subsequently amended and now in force, and all other ordinances of the city now in force or hereafter adopted, so far as applicable." There was an entirely new and different state of things provided for under the resolution of December 19, 1889, and the

ordinance of September 24, 1890, than that which was provided for in the ordinance of 1875. The ordinance of 1875 provided for the use of horse or pneumatic power only, while the ordinance of September 24, 1890, provided for the use of electric power only. The entire plant was newly constructed, new ties, new rails, new cars, road-beds all made over, and the tracks widened on every line; poles erected in the streets and wires strung overhead, and radical changes made in the manner of operating the road. There was very little of the old ordinance remaining which "was applicable" to the new state of things as they existed and were provided for under the ordinance of September 24, 1890.

The ordinance of July 10, 1878, permitting the street railway company to use steam and other power on the First avenue line, so called, never arose to the dignity of a contract, even after the validating act of 1879; there was no provision for an acceptance of it by the company as a contract, and no acceptance shown beyond that of a license; the authority to use steam power was revoked
209 by ordinance of October 29, 1886, and the authority to use any other known power but that of electricity, by the ordinance of September 24, 1890. We are of the opinion that there is nothing remaining of the old contract that would, by the enforcement of the ordinance in question, "impair its obligation."

If the respondent's claim that the resolution and ordinances under which it is now operating its road, is a contract, is correct, the reservation made in section 8 of the ordinance of September 24, 1890, wherein it subjected the respondent to all the conditions — limitations of the ordinance of 1875, "which might be applicable," and to such ordinances that might thereafter be adopted, the city reserved the right to regulate and prescribe the terms under which the respondent might in the future enjoy the right to use the streets. The reservation in its terms is broad, and would be construed to reserve the right to provide, by ordinance or otherwise in a form prescribed by the charter, all reasonable and needful rules for the conducting of the respondent's business on the public streets beyond a mere police regulation which is conceded by the respondent it would be subject to, regardless of any reservation for that purpose.

City of Detroit *vs.* R'y Co., 54 N. W. R. 958.

In this case the ordinance under which the street railway company constructed and operated its road, contained the following reservation: "It is hereby reserved to the common council if the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railway." It was held that an ordinance requiring the com-
210 pany to keep tickets for sale on its cars came within the reservation and was a valid ordinance. The court says "Ordinances containing grants are construed liberally in favor of the public. It cannot be contended that the relation created by the ordinance is contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and could not be

bartered away. * * * The contract is not intended for a shield for respondents alone."

Merrick *vs.* Bradley, 33 Minn. 377.
Perrin *vs.* Olson, 1 Minn. 202.
Stenberg *vs.* Steele, 54 N. W. R. 553.
R'y Co. *vs.* Barry, 18 S. W. Rep. 1026.
R'y Co. *vs.* Philadelphia, 58 Pa. St. 119.
Tomlinson *vs.* Jessup, 15 Wallace 498.
Soo City R'y Co. *vs.* Sioux City, 138 U. S. 98.

In the last named case the court held that no question could arise as to the impairment of the obligation of a contract when the company accepted all of its rights subject to the usual power to modify or impose additional burdens upon the enjoyment of the same.

W. Phila. R'y Co. *vs.* Phila., 10 Phila. 70 and 72.

In this case the courts say that when a corporation accepts a license or permit to use the public streets for a street railway, it uses it subject to the right of the city to make all needful rules and regulations for the convenient enjoyment of the same, and it holds its privilege subject to the proper exercise of this power. If anything unreasonable is required the court will set it aside.

Such a construction of the reservation is required to pro-
211 tect the public interest. We are clearly of the opinion from what we have hereinbefore stated, that the resolution and ordinance under which the respondent is now operating its road, is not a contract between it and the city, which cannot be modified or changed without the respondent's consent, that it is nothing more than a license or permit on the part of the city, to the respondent, to use certain streets of the city for street railway purposes, upon the conditions named and provided for in the ordinance, and on such other reasonable conditions as the city in future may see fit to impose, and if the ordinance in question does not impose unreasonable conditions on the respondent, it is valid and may be enforced. The license to use the streets for railway purposes is not granted for the special benefit of the respondent but for the convenience of the public. The city has no authority, as the guardian and trustee of the people to surrender any rights to the use of the streets which are detrimental to the public interests. We are also of the opinion that the ordinance in question may be enforced as a police regulation if the obligations imposed on the respondent are not unreasonable and do not substantially impair the property rights of the respondent.

All the powers delegated by the legislature to the city by section 5 of chapter 4 of the charter, with one exception, that for making contracts for the erection of gas works, found in the eleventh subdivision of that section, are legislative in their character, and the laws of the city by way of resolutions and ordinances on all subjects named and within the power delegated by that section are as effectual and binding as if they emanated directly from the legislature.

212 State *vs.* Robinson, 42 Minn. 107.
City of St. Paul *vs.* Smith, 27 Minn. 366.

Subdivision 34 of that section empowers the city council "to license and regulate hackmen, draymen, expressmen, and all other persons engaged in carrying passengers, baggage, or freight, and to regulate their charges therefor, to prescribe standing places or stations within the streets, and so forth." It has been held by the courts from the earliest history of our jurisprudence that it was competent for the legislature to make reasonable regulations for the government of hackmen and other persons engaged in carrying passengers in vehicles on the public streets for hire. The language is broad and comprehensive—"may regulate" * * * all other persons engaged in carrying passengers." That means all persons conveying passengers for hire as a business, in vehicles operated on the public streets. There can be no question but what the fair construction of the language indicates and includes the business of the respondent. Its sole and exclusive business is to carry passengers in coaches on the public streets. It can make no difference whether the vehicles are propelled or drawn by horse or electric power, whether they move their wheels on rails laid in the street or on the road-bed.

Frankfort R'y Co. *vs.* Phila., 5 Pa. St. 119.
Millhan *vs.* Sharp, 17 Barb. 435.
Mayor *vs.* Railway Co., 117 N. Y. 404.
State *vs.* Herod, 29 Ia. 123.

The authority of the city to make ordinances under and by virtue of a charter provision very similar to this, has been very liberally construed by our supreme court in the case of Duluth *vs.* Mallet, 43 Minn. 204, in which it was decided that box cars used in the
213 business of an ordinary railway, was a carriage within the meaning of the ordinance.

The only remaining question on this branch of the case is, had the legislature authority to grant any such powers to the city? Or in other words, would a statute of that kind be valid as a law providing for police regulation? If it would be, there can be no question but what the legislature could confer the right on the City Council, and an ordinance passed by it in pursuance of such right would be equally valid.

The extent to which legislation of this character may go, in regulating business by what is denominated police power, and be held valid, has been a question of much doubt; until of a recent date legislation of that kind has been confined, with a few exceptions, to providing for the protection of public morals, public health and public safety. But the disposition of the great railway corporations of the country who girdled it with its roads and who are the carriers of passengers and freight from one part of it to another, employed by the people for that purpose as a necessity by reason of this changed means of transportation and other institutions of like nature in respect to their dealings with the public, to charge what was believed to be unjust and unreasonable rates for the services they performed, and in making discriminations between persons and communities, induced the legislatures of many states to pass statutes regulating their business, fixing the maximum charges for carrying passengers

and freight, providing against discriminating between one community and another, and in a general way directing and regulating the conduct of their business. Those wealthy corporations denied the authority of the state to interfere with their business, insisted
214 that the laws were unconstitutional and void, and resisted the attempted enforcement of the same. They employed the ablest lawyers the country afforded, carried their cases to the highest courts, where they received, as the adjudicated cases show, the most careful and thorough investigation and consideration, and in all instances the right has been sustained as a proper police regulation.

In the leading case announcing this doctrine, Munn *vs.* Illinois, which after it had been sustained by the Supreme Court of Illinois, went to the Supreme Court of the United States, 94 U. S. 113, Judge Waite in his opinion says "that, under the powers of government inherent in every sovereignty, the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property when such regulations become necessary for the public good." In a later case decided by the New York Court of Appeals, People *vs.* Budd, 117 N. Y. 1, on the same subject, the court in its opinion says, "Society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and as a check upon the greed of these consolidated interests. * * * These regulations in no way interfere with a rational liberty, liberty regulated by law." This doctrine based on the reasons stated in the cases cited, has been affirmed in many cases by the United States Supreme Court, and all of the state courts, as far as our knowledge extends, where it has been adjudicated upon.

Sinking Fund Cases, 99 U. S. 700-747.
215 Waterworks *vs.* Schouler, 110 U. S. 347.
Railway Co. *vs.* People, 118 U. S. 557-569.
Dow *vs.* Beidelman, 125 U. S. 680-686.
Railroad Co. *vs.* Minn., 134 U. S. 418-461.

The doctrine laid down in Munn *vs.* Illinois, and People *vs.* Budd, has been endorsed by the Supreme Court of this state, in Rippe *vs.* Baker, 57 N. W. Rep. 331, 56 Minn. 180. In its opinion in that case the court says in addition: "When a business is a proper subject of police regulation doubtless the legislature (in this case the City Council) may in the exercise of that power adopt any measure they see fit, provided only they adopt such as have some relation to and have a tendency to accomplish the desired end, and if the measure adopted have such relation or tendency the courts will never assume to determine whether they are wise or the best that might be adopted. The cases are uniform in holding that where there *is no reservations* in the charter, the legislature may interfere and prescribe regulations for railroad corporations; the power in those cases does not turn upon the fact that it affects corporations deriving their existence

from the state, but upon the fact that the corporations are common carriers and therefore subject to legislative control.

Granger Cases, 94 U. S. 113.
Dow *vs.* Beidelman, 125 U. S. 680.
Railroad Co. *vs.* Railroad Co., 111 New York 132.

There can be no question but what the respondent is a common carrier of passengers and subject to police regulations as defined in the decisions. Neither can there be any question but what the legislature has conferred the authority on the City Council to
216 regulate its business on the public streets while it occupies them for business purposes.

The only remaining question is: Was the ordinance in question a reasonable regulation. The presumption is that it is, but it is not conclusive; it may be shown to the court that it is unreasonable and in such an event the court will not lend its aid to enforce it and may adjudge it invalid.

Enson *vs.* Railway Co., 45 Minn. 370.

In order to defeat the ordinance it is incumbent on the respondent to show that it is unreasonable. Has that been shown? It must be determined from the testimony in the case.

The evidence in the case shows that the mode of transferring passengers from one line to another now in force, fails to accommodate a large number of people riding on its cars as well as they would be accommodated under the provisions of ordinance in question. Persons coming from the residence portions of the city to the business center are in some instances required to ride from five to fifteen blocks to obtain a transfer under the provisions of the ordinance in question. The evidence shows that the present mode of transfer is discriminating in its operations; those people living in certain localities in the city are not permitted to enjoy the same privileges under similar conditions as the people living in other portions of the city, as for instance, the people living on the Kenwood line under the present system of transfer, cannot go to Lake Harriet, or out on the Lyndale line, without paying two fares, while the people using any line, the cars of which go around the loop or across from the east side of the river, can obtain transfers and go to that lake on one fare,
217 although they travel a much greater distance, and the Kenwood line is not a parallel line with the line going to the lake beyond its intersection at Hennepin avenue; and the present system of transfers results in producing a crowded condition of the cars at their junction in the business center of the city, resulting in the discomfiture of the passengers, which would to a considerable extent be obviated if transfers were made at the junction of diverging or intersecting lines, as provided for by the ordinance in question.

The facts as established by this evidence, are conceded by the respondent to be substantially correct. But it is claimed that the change would be detrimental to their business, that it would lose money if such a change should be made as demanded by the ordinance; that it would be required to issue more transfers and have

less cash for the same amount, or more travel, and that there would be a much greater opportunity to defraud the respondent by dishonest passengers and employés. The city did not grant the right to the respondents to use the public streets for railway purposes for its sole benefit, but it was granted solely for the benefit of its citizens and the general public and for their convenience. In attempting to obtain that object it would be impolitic as well as unjust on the part of the city to impose onerous duties and obligations on the respondent to the extent that it cannot realize a reasonable compensation for the capital invested beyond the expenses of operating *their* railway; imposing obligations beyond that would result in defeating the objects for which the rights were granted. There is no evidence in this case tending to show that if the ordinance in question was enforced and carried out by the respondent that it would so
218 far impair the rights of the respondent or reduce its revenue to the extent that it would not then, from its operation, receive a fair and reasonable compensation for the capital invested over and above its operating expenses and maintaining the plant in a good and serviceable condition. Undoubtedly this city has the best railway system of any city in this country, owing to natural conditions, the energy and business ability of its projectors and managers, and the liberality with which the city has treated it on its part. The interest of the public, represented by the City Council and the respondent's are mutual to a certain extent; the public desires good accommodations for travel and respondent a reasonable compensation for the use of its capital; the one cannot be had without the other. These questions should all be settled between the parties out of court so that the rights of all should be preserved. Courts have not the power that the parties have in the matter, but they have the authority to protect the public interest, as against the greed of individuals or corporations serving the public as common carriers when they want regulations provided for their conduct in serving the public, which are not unreasonable and are for the public benefit and do not in the performance of the same destroy their property or unreasonably impair their property rights. Such we believe this case to be.

SEAGRAVE SMITH, *Judge.*

219 EXHIBIT "E."

STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

THE STATE OF MINNESOTA on Relation of THE CITY OF MINNEAPOLIS, Relator,
vs.
THE MINNEAPOLIS STREET RAILWAY COMPANY, Respondent.

Stipulation for Dismissal.

The above named respondent having put in full force and effect in the City of Minneapolis the transfer system provided for in the ordinance set out in the alternative writ herein, which ordinance was passed on the 28th day of July, 1893, it is hereby stipulated and agreed that the above entitled matter may be and the same is hereby dismissed without costs to either party.

Dated May 9th, 1894.

KOON, WHELAN & BENNETT,
D. M. MUNN,
Attorneys for Respondent.
MESSRS. BROOKS & HENDRIX AND
HALE & MORGAN,
Counsel for Relator.
DAVID F. SIMPSON,
Attorney for Relator.

220 And on August 20th, 1907, the following stipulation was filed of record in said cause, to-wit:

221 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Stipulation.

It is hereby stipulated by and between the above named parties that, in the year 1881, the Legislature of the State of Minnesota duly passed Section 1, Chapter 76, Special Laws of 1881, with reference to the provisions of the general charter of the city of Minneapolis, which said special law reads as follows:

"No law of the State contravening the provisions of this act shall be considered as repealing, amending or modifying the same, unless such purpose be expressly set forth in such law."

And it is further stipulated that for all of the purposes of this case the charter of the city of Minneapolis, and all amendments thereto, shall be considered and construed as public acts of the State of Minnesota; and that judicial notice shall be taken thereof in this action; and that either party hereto, or both, may, in any trial of, or hearing upon, the same, treat any and all provisions of said charter the same as though each and every provision thereof, and each and every amendment thereto, were fully set forth in the pleadings herein, and that the printed copies of the Minneapolis City Charter, published by authority of the City Council, of the city of Minneapolis, June 1, 1905, shall be, for all purposes of this case, considered as correctly setting forth all of said charter, and its amendments, and that wherever the date or dates of the passage of any of the provisions, contained in said charter of the city of Minneapolis, are considered material by either party to this action such date or dates shall be determined by reference to the special laws of the state
222 of Minnesota, and that for all of the purposes of this action such special laws relating to the charter of the said city of Minneapolis shall be treated as public acts of which judicial notice may be taken upon the trial of, or hearing upon, this case.

Dated this 20th day of August, A. D. 1907.

M. D. MUNN,
N. M. THYGESON,
Attorneys for Complainant.

KOON, WHELAN & BENNETT,
Of Counsel.

FRANK HEALY,
Attorney for Respondent.

LANCASTER & McGEE,
Of Counsel.

Endorsed: Filed August 20th, 1907 Henry D. Lang, Clerk, by Margaret C. Noonan, Deputy.

223 And on the 20th, 21st, 22nd, 23rd, and 24th days of August, A. D. 1907, the following Court proceedings were entered of record in said cause, to-wit:

224 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, August 20th, 1907.

TUESDAY MORNING.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, Judge; Honorable Page Morris, Judge; Margaret C. Noonan, Deputy Clerk.

(Before Judge Lochren.)

(No. 755.)

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

This cause coming on to be heard on the order to show cause why a temporary injunction should not issue as prayed for in the Bill of Complaint, the complainant appears by its solicitors, Messrs.
225 M. D. Munn, N. M. Thygeson and M. B. Koon, and the defendant by its solicitors Mr. Frank Healy and Messrs. Lancaster & McGee.

Mr. Munn presents and argues said cause to the Court on behalf of the complainant.

Mr. Lancaster presents and argues the cause to the Court on behalf of the defendant in part.

And the hearing of said cause not being concluded at the hour of adjournment, it is by the Court

Ordered: That further proceedings be and the same hereby are postponed until Wednesday morning, August 21st, 1907, at ten o'clock.

Ordered: That this Court be and the same hereby is adjourned until Wednesday morning, August 21st, 1907, at ten o'clock.

A true record.
Attest:

HENRY D. LANG, *Clerk,*
By GEO. F. HITCHCOCK, JR., *Deputy.*

226 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, August 21st, 1907.

WEDNESDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge; Page Morris, Judge; Margaret C. Noonan, Deputy Clerk.

(Before Judge Lochren.)

(No. 755.)

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

This day again come to the parties to this cause by their respective solicitors and the hearing of the same is resumed.
Mr. Lancaster continues his argument for the defendant.
And the hearing of said cause not being concluded at the hour of adjournment, it is by the Court
Ordered: That further proceedings be and the same hereby are postponed until Thursday morning, August 22nd, 1907, at ten o'clock.
Ordered: That this Court be and the same hereby is adjourned until Thursday morning, August 22nd, 1907, at ten o'clock.
A true record.
Attest:

HENRY D. LANG, *Clerk*,
By GEO. F. HITCHCOCK, JR., *Deputy*.

227 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, August 22nd, 1907.

THURSDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge. Honorable Page Morris, Judge. Margaret C. Noonan, Deputy Clerk.

(Before Judge Lochren.)

No. 755.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

This day again come the parties to this cause by their respective solicitors and the hearing of the same is resumed.
Mr. Lancaster continues his argument for the defendant.
And the hearing of said cause not being concluded at the hour of adjournment, it is by the court
Ordered: That further proceedings be and the same hereby are postponed until Friday morning, April 23rd, 1907, at ten o'clock.
Ordered: That this Court be and the same hereby is adjourned until Friday morning, August 23rd, 1907, at ten o'clock.
A true record.
Attest:

HENRY D. LANG, *Clerk*,
By GEO. F. HITCHCOCK, Jr., *Deputy*.

228 United States Circuit Court for the District of Minnesota Fourth Division.

Term Minutes, April Term, A. D. 1907, August 23rd, 1907.

FRIDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren Judge. Honorable Page Morris, Judge. Margaret C. Noonan, Deputy Clerk.

(Before Judge Lochren.)

No. 755.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

This day again come the parties to this cause by their respective solicitors and the hearing of the same is resumed.
Mr. Lancaster resumes and closes his argument for the defendant.

And the hearing of said cause not being concluded at the hour of adjournment, it is by the Court

Ordered: That further proceedings be and the same hereby are postponed until Saturday morning, August 24th, 1907, at 9.30 o'clock.

Ordered: That this Court be and the same hereby is adjourned until Saturday morning, August 24th, 1907, at ten o'clock.

A true record.

Attest:

HENRY D. LANG, *Clerk*,
By GEO. F. HITCHCOCK, JR., *Deputy*.

229 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, April Term, A. D. 1907, August 24th, 1907.

SATURDAY MORNING.

Court opened pursuant to adjournment.

Present: Honorable William Lochren, Judge. Margaret C. Noonan, Deputy Clerk.

No. 755.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

This day again come the parties to this cause by their respective solicitors and the hearing of the same is resumed.

Mr. Munn further argues the cause on behalf of the complainant.

Mr. Koon further argues and closes the arguments on behalf of the complainant.

The hearing of the cause and the arguments being concluded, the Court delivers an oral decision directing complainant's solicitors to prepare a decree in accordance therewith to be hereafter signed, filed and entered herein.

230 And on the same day the following oral decision was rendered in said cause, to-wit:

231 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Appearances: For Complainant, Messrs. M. D. Munn, N. M. Thygeson and M. B. Koon; for Defendant, Mr. Frank Healy and Messrs. Lancaster & McGee.

LOCHREN, *J.* (Orally):

This is certainly a very important case, involving, as it does, the rights of this corporation which has constructed operated and managed all the street railways in this city for so long, and affecting also the public interests, the rights of the people who are the patrons of this road, and from necessity have to pay for the accommodations which they receive from the road.

It is claimed on the part of the complainant that it is a corporation formed under title 1, of chapter 34, of the general statutes of the state, its articles having been executed on the 23rd day of June, 1873, and fixing the date of the commencement of its existence as of July 1st of that year, and of its continuance as fifty years from that time.

232 It claims to have been such a corporation as might have been organized, and that it was organized, under that title and that it still continues, as that term of 50 years has not expired. It also claims that some two years later, on July 9, 1875, by an ordinance passed by the city of Minneapolis allowing this corporation to practically maintain and operate a street railway upon the streets and avenues of the city, and providing, among other things, that the street car company might charge fares to the extent of five cents for each passenger, and that the city council after five years, might regulate the rates of fare, but should not reduce the fare below five cents, that the city is under a valid contract obligation not to reduce the rate of fares below five cents. It is perhaps unnecessary to discuss what the effect of that reserved power in the city council was. It is certain that it is prohibited by that contract in its power to lower fares below the sum of five cents, during the life of that contract.

The case is submitted on bill and answer, and there being no contest in respect to any matters of fact, it is admitted that the complainant company went on under that ordinance and constructed a system of street railway in this city, the motive power being animal power at that time, that being one of the kinds of power that was mentioned in the ordinance to which I have referred, and that it has gone on from that time to this operating the system of railway upon the streets of the city which have been designated for that pur-

pose from time to time by the city council, and that in 1889
233 and 1890, by consent of the council, and in accordance with ordinances passed by the council, and accepted by the company, it was first agreed to establish upon certain designated streets of the city, cable lines to be operated under a change in the charter, respecting motive power, and that these afterwards were changed to electric lines, there being prior to that an ordinance providing for the occupation of one street for experiments as to the efficiency of electricity as a motive power. That following this ordinance, and especially the ordinance of September 19, 1890, the whole system has been changed so far as the motive power is concerned, to the use of electricity as a motive power, but complainant claims that there has been no change in the provision of the ordinance I am speaking of, of 1875, the contract provision in that ordinance, with respect to fares from that time to the present: and it is complained that on the 9th of February, of the present year the city council passed an ordinance reducing the amount of fare which the complainant was entitled to collect from passengers by providing that it should issue six tickets for twenty-five cents, each of those tickets representing a full fare, and that the effect of his ordinance is to impair the obligation of the contract entered into between the complainant and the defendant on the 9th of July, 1875, by the ordinance that I have referred to, and that one probable, immediate result would be the danger of annoyances to the servants of the company, the conductors and others on street cars, by reason of citizens claiming under
234 this last ordinance the right to have these tickets, six for twenty five cents, which, if refused by the conductors, would lead to disputes and altercations, and tend to the prejudice of the business, and at any rate to the disturbance of the company in carrying on its business, and that the company would also be liable to numerous actions which might be brought,—not only such actions as might be brought by the city, but suits brought by all passengers upon the railway system who were refused this reduction of fare; therefore a court of equity should step in and relieve the complainant from this danger, and to that end it would be entitled to have the city, and city officials, enjoined from attempting to enforce this ordinance on the ground that it would impair the obligation of said contract.

The first objection made by the defendant is that this action is premature and that there is no such ordinance as the alleged ordinance of February 9, 1907, in force, and therefore the complainant is in no danger from that ordinance; because it has not been published as required by the city charter to be published before it can be in force; that it is still in the same condition that it would be if it was not fully enacted by the city council. That is, that it remains an uncompleted act, and that courts will not ordinarily attempt by injunction to tie the hands of legislative bodies or those that are invested with legislative powers while they have not completed the legislative act which is complained of.

I think that that position is true as a general rule. There may be

exceptions to it, but I think they are very few and not to be
235 extended. It is fair to presume that while a matter is still in the hands of the legislature or the city council, or any body having the power of legislation, the presumption the courts ought to entertain is that before it leaves their hands, before it is completed, right and justice will be done, and that it would be improper to attempt to harass such body by any injunction, and such writ would not ordinarily be issued under those circumstances. Therefore the question is whether under the facts in this case this is a completed ordinance and one which menaces the complainant in the complainant's present situation, although it has not been published.

It seems to me to be completed. It has gone through all the steps which the council would take in the passage and enactment of an ordinance. Of course it is not necessary that I should attempt to rehearse what those would be from the introduction of the proposed ordinance in the body by some of its members, passing through the different readings and references to committees and reports and amendments, and everything of that kind, until its final passage on a vote of yeas and nays; but it appears to me in fact that this ordinance has passed through all those steps and that it is an ordinance passed by the council, transmitted to the mayor, and which has received his signature, he having the right, and it being his duty, to sign it if he approves of it, and if he does not approve of it to return it to the council that passed it with his objections, when
there would remain legislative action to be taken; that is,
236 the vote by which it was passed would be reconsidered and the objections made by the mayor would receive consideration from the council, and they could act upon it as to them seemed right and proper, with the right, of course, to reject the ordinance at that stage, or, if they deemed it should be passed, to pass it over the veto of the mayor, if it received the requisite number of votes for that purpose. It had passed through that stage. There was nothing further in the way of performance of any legislative function, it seems to me, to be done in respect to that ordinance. It is a completed ordinance. If it is constitutional, it is then a valid ordinance, although the operation of it is suspended until the publication, which would give notice to every person of the fact that such an ordinance was passed and is in existence. It seems to me this does not differ at all from what would be the case if an ordinance was passed as acts of the legislature are frequently passed, to take effect at a subsequent time. They are complete as far as legislative action can go at the time of the passage. There is no legislative action to be taken between that time and the time they go into effect; and there is no legislative action in this case, it seems to me, between the time when this ordinance was signed and approved by the mayor, the last legislative action in connection with it, and the time when it shall be, if it ever happens, published. That is merely a ministerial act, the publication of it, which I think, according to the provisions of the city charter, and the general law in relation to

villages and cities, would devolve upon the clerk perhaps
237 to pass the proper copy of it to the printer, and the printer to print it. The action of the clerk would not be legislative; the action of the printer would not. It would not be legislative at all, and it is not interfering, therefore, with legislative functions to grant an injunction at the present time and to enjoin the publication of it, because that is an act which puts it in force and puts the complainant in danger of it, which would be liable to bring upon the complainant the strenuous demands of persons who would become passengers upon the street cars for conformity with the ordinance, and liable to bring about disturbance if those demands were not complied with; and liable to bring also some kind of suits on the part of the city for the purpose of compelling the complainant to comply with it. And, therefore, I hold that this suit is not prematurely brought, and that it is proper to restrain the publication of the ordinance, it having passed the legislative state. I do not know of any such case—none has been cited upon the argument, although the argument has been unusually full and able—there has no case been cited that I remember of that involved the question at all. I do not know of any case, except perhaps a suit that was commenced in the state of North Dakota in the Federal Court by the Northern Pacific Railway Company against the Board of Railway & Warehouse Commissioners, if that is the proper title to that body in that state, I am not sure, but it has the same functions as that board has in this state of fixing rates, and by the act constituting that board and empowering it to act, it is required, when it fixes rates,
238 to publish them in a certain paper, and they are to go into effect, if my recollection serves me, at a certain time after such publication has been completed. In that case the action was commenced by the Northern Pacific Railway Company against the Board of Railway & Warehouse Commissioners, if that is the proper title, and also against the publisher of the newspapers, and perhaps other state officials, to restrain them from attempting to put the order of that commission into force and from publishing the order, and a restraining order was issued in the order to show cause why a temporary injunction should not be granted. My information is that that matter was settled and did not go really any further, so there was no adjudication in the case as to whether that was proper practice or not; but it was the practice then adopted. I think there was an arrangement made by which the railroad and warehouse commission made some changes in the rates so that the railroad company agreed to them and the litigation did not go on.

This brings me to consider the principal questions in the case. It it contended on the part of the complainant as I have said that it is a corporation of the character mentioned, and that its duration is for fifty years; that it was organized under title 1, chapter 34, of the general statutes. This question is important whether it was organized under title 1 or some other title of chapter 34 of the general statutes, because if it was organized under title 1 then it still continues under the organization that was formed by its
239 articles, and still continues such corporation at this time, as title 1 allows corporations formed under that title to be

formed for the period of fifty years. It requires the articles of incorporation to state the date of commencement and the time of the continuance of the corporation, and in its articles the complainant in this case did state the time of its commencement to be the first of July, 1873, and the date of its continuance to be fifty years.

It is claimed on the part of the defendant that it was not organized under title 1, and could not be; that it was a street railway, and that there was no provision that such a corporation might be formed under that title for that purpose, the purpose of establishing and conducting and operating a street railway; but that it was a corporation which might be organized under title 2, of Chapter 34, and that in determining whether it was under one title or the other the recitals in the articles of incorporation would not be conclusive, but that it should be determined by what was stated in the articles as to the objects of the corporation and the purpose for which it was formed. In that respect I apprehend that the statement of counsel for defendant as to what would determine the character of such corporations is correct, and therefore we will have to look into that statute and consider the character of this corporation to determine whether it was such a one as could have been formed under the provisions of title 1 of that chapter.

240 There are in that chapter five titles under which corporations could be formed. Title five relates to cemetery corporations; title four relates to religious corporations. Those could not be considered, of course. Title 3 relates to corporations that are formed not for pecuniary profit, such as colleges and *cemeteries* and lyceums and societies, either legal, medical or scientific. It certainly does not come under that; it could not have been formed under title 3. Title 1 relates to corporations that are authorized, or may be authorized, to exercise the right of eminent domain. That is the general heading of the title. Title 2 relates to corporations that are formed for pecuniary profit, other than those that are allowed to be formed under title 1. In looking through this title and the description of corporations that may be formed under it, it seems they are all for the purpose of conducting private enterprises; mining, smelting, manufacturing, lumbering; agricultural, mechanical and chemical businesses are the kinds that are mentioned specifically. Each one of those kinds of business is a private business in which the public has no concern. They are entirely for the purpose——

Judge LANCASTER: Does your Honor have in mind the amendments, or just 1865?

The COURT: I was referring to the law as it stood when this corporation was formed, the law of 1866. Now, this is a corporation which evidently is not formed simply for the purposes of private gain. It is not a private business. It is a quasi public cor-

241 poration, a corporation formed for the performance of public service wholly. Its entire business is the carriage of passengers for hire, and it is obliged to carry everyone who offers himself to be carried. Its duties are public. It is a corporation of the character that is ordinarily empowered to exercise the right of eminent domain, which is one of the highest powers of the sovereignty,

the power to take private property for a public use; therefore, a corporation can only exercise that power when the right to exercise it is delegated by the sovereign, and then only for a public use. It is only where the corporation is a public service corporation, a quasi-public corporation, that it can be authorized by the legislature, by the sovereign, or invested with the exercise of that power. Now, there is no such corporation, no such business as that, included in title 2 of chapter 34, of the general statutes of 1866, and I feel, therefore, compelled to hold that this corporation could not have been formed under that title for it is not at all of the character of the businesses that are named for which corporations may be formed; and even although that title might be extended to kinds of business that are not particularly named, they would have to be corporations of a similar character in order to come under it. This is not of similar character to come under it, and therefore if it was not a corporation formed under title 1, its business was not such as would allow its promotors to form a corporation under title two and they would have no authority under the statutes of 1866 to form a corporation at all.

The question, therefore, is narrowed to the consideration
242 of whether the business that these promotors proposed by the articles of incorporation to engage in was such as would permit of incorporation under title 1. If it was not, then it was not a corporation.

Title 1 in its heading states it to refer to corporations authorized to exercise the power of eminent domain. Then it specifies "railways, canals, and slack water navigation, either in lakes or rivers," and some other kinds, perhaps, but all evidently public service corporations, quasi-public corporations, corporations which under the laws it has been always understood might be invested with the right to exercise the power of eminent domain for public use. As I said before, a street railway is a corporation of that character. It is a quasi-public corporation. Its duties are to render public service.

Now, it is true that street railways, by that name, are not mentioned in title 1. Railways are mentioned as the very first kind of business that is named in the title. It also includes "any other public improvement;" any association formed for the purpose of carrying on the work of public improvement; but it seems to me that the title of "railways," without more, covers the case of street railways. In other words, that "railways" is a generic title which covers all kinds of railways. A railway is a way which is made for the movement of cars, or something of that character, upon tracks that are laid down either on the street or somewhere else. They are not propelled as ordinary vehicles, such as wagons and carriages,
243 are on the highways generally, but require for their operation that tracks be expressly formed to be moved upon, and a street railway is of that character; therefore it is distinctly a railway.

Now, there is nothing in that statute which would indicate that street railways were not included in it. They are railways. They perform public functions. It is proper to invest them with the

power to exercise the right and power of eminent domain. There is no reason in the world why they should be omitted. It is true, as stated by Judge Mitchell in some of the cases, that where the word "railway" is used in statutes it usually refers to commercial railways. I do not think there was anything in his statement, (because he was usually pretty careful) that it was universally so and that there were no exceptions, because if he had made that statement he would be incorrect. I think it is true that the statutes to which he refers are usually statutes enacted for the purpose of regulating commercial railways and their use in the state. Such statutes have provided that such railroads shall have signs at crossings of streets and highways, and that they shall give notice of the passing of trains by ringing the bell or sounding the whistle, and also, perhaps that in respect to couplers they should use none except those that couple automatically by impact for the safety of the employees employed in the operation of the railroad. Now, all those provisions would have nothing to do with street cars, and where there was such
244 a provision in a statute it is easy to see that street cars were not intended or meant.

The same may be said of the act of the legislature abolishing, what is known among lawyers as the fellow servant rule as a defense in the case of injury to employees upon a railroad. That would have no application to a street railroad, because the dangers to which employees are subject on an ordinary commercial railroad do not occur in the case of a street railroad.

There is another kind of railroad that has been established and used in this state to some extent, which is entirely a private railroad, which could not exercise the power of eminent domain, and would not be entitled to. No one would be entitled to be incorporated for the purpose of running such a railroad, although it might be done by a corporation that was formed under title 2 for carrying on the lumber business; but it is well known that men engaged in lumbering in this state have private railroads running for some distance, some miles, for the purpose of moving their logs and getting them to mills or to the streams where they may be floated, and it is very possible that, although those railroads are not formed under any charters, they are or may be owned by corporate bodies. A good many of these regulations would apply to them, such as the regulations requiring signs if such a railroad should be run across a public highway, or before a locomotive should pass a highway there should be warning given by ringing the bell or sounding the whistle,
245 or something of that kind; and the Supreme Court of the state have held that the law abolishing the fellow servant rule does apply to this kind of railroads, although they are not mentioned at all in the act, the act mentioning only railways. So it is not true that where railways alone, without more, are mentioned in the statute it always refers to a commercial railway, and I see no reason why it shouldn't, as it is used in title 1, chapter 34, include street railways, as well.

Now, section 13 of that act, and sections following, provide for the procedure, notice and use of the power, complating the power, exercising the power of eminent domain. No, that is not true. Section 13 provides in respect to what property matters it may be exercised; that is, to obtain the right of way over and across any lands needed for the construction of any railway, telegraph, and the necessary sites and grounds for depots, shops, or other buildings requisite for the purpose. Now, it may be true that a street car company which confines its tracks entirely to the streets, as it properly ought to, and ought to be expected to do, would not need the exercise of the power of eminent domain for the purpose of obtaining a right of way, if it obtained that right of way from the city council, but it would or might need the exercise of the power of eminent domain for many other purposes, such as obtaining sites for shops and for other buildings necessary for the conduct of the business. Now, even in the old days when this was a horse railroad here in Minneapolis, it was necessary to use other buildings. The street car company
246 couldn't get along, if confined to its right of way entirely. It would have to have some place to put up its cars at night. And when it was run by animal power, to house its animals and feed them. There would be no opportunity to do this if they had to keep the animals upon the streets. It would not be expected. And where the corporation has the authority to exercise the power of eminent domain it may exercise it in a case where it might be convenient, although it might get along without.

It would also, besides having to get a place to house its cars and its animals, need to have shops for the purpose of repairing its cars from the result of the natural, wear and tear and breakage which must happen to such things, and as a matter of fact it is well known to the old residents that the street car company did at a very early day obtain such ground, not by the exercise of the power of eminent domain, but by purchase. For instance, when this line was first established, I know that it obtained down in my neighborhood a block of land upon which was formerly the resident of Caleb C. Dorr, down between 13th and 14th Ave. S. E., and upon that established barns and stables and places to house cars; and at a later day it obtained on the east side—I am a great deal more familiar with that than upon the west side—it obtained a block of land from Farnham & Lovejoy somewhere about Second Avenue north between Third and Fourth streets, using that whole block. Perhaps that was done after they changed to electricity. My recollection of its
247 use was as a storage place for electric cars. It would necessarily have and be obliged to have, storage places for cars when not in use in a portion of the night time. There is generally a time somewhere between midnight and morning when the cars are not in use and when they would be an obstruction and nuisance if allowed to stand upon the streets, and the city would not permit this; or that they should be allowed to stand upon the streets when they were not in use, in the day or nighttime either. Consequently there would have to be some place provided for keeping them during those times. And also, as I said before, for the location of shops, for repairs at least, and it seems to me that it would be entirely proper

to obtain through the power of eminent domain, if it could not be done by purchase, shops for the building of cars, although that would not be absolutely necessary as cars might be purchased from other persons who built cars, but it would be a proper exercise of the power of such a corporation to build its own cars, and proper for them to obtain, by the power of the exercise of eminent domain if necessary, the proper site for building those cars. I will therefore conclude that this corporation which attempted, so far as the incorporators were concerned, to be organized under title 1, chapter 34, of the laws of 1866, was so organized under that title.

Then the question comes whether the contract made between the city and the complainant, the street car company, as to fares still continues in force; and I understand it to be admitted by
248 counsel for defendant that there was such a contract made by virtue of the ordinance of July 9, 1875, and that that contract was valid and enforce-able and binding upon the parties during its existence, the claim on the part of the counsel being that it ceased to exist in 1903; when, as they claim, the charter of the street car company ceased also to exist, having as he thought been organized under title 2 of chapter 34 with the limitations of 30 years; but under my holding that it is yet a corporation and that the charter privileges rendered to the company as a contract by virtue of that grant, the power to make the contract being given, if not by the charter, by the act of March 4, 1879, which validated in terms that contract.

It is claimed also on the part of the defendant that this was only a company authorized to establish and operate a street car run by the motive power which is mentioned in that contract, either animal or pneumatic power, and that when it ceased to use that power it ceased to be the same corporation; that it gave up its corporate rights, or its contract rights under that ordinance by ceasing to use that particular kind of power. My conclusion is different from my reading of the contract. There is no doubt that at the time this contract was entered into and this ordinance was passed and accepted by the street car company it was understood that the street car service to be established under it would be one in which the cars would be propelled by animal power. It was provided it should be either by animal or pneumatic power. I think the state-
249 ment of Judge Koon is true that pneumatic power was something that was somewhat fanciful at the time; that it had not been tried for such purpose. I never knew of its being tried for a purpose of that kind. I do not understand how such a power could be made applicable to the propulsion of a street car. Pneumatic power is something that is done by compressed air; but how it can be compressed and applied to such a use I do not understand. Still this contract does seem to contemplate that such power may be used. It does contain provisions which shows it was contemplated, and also that it might change the kind of power to be used, for it says:

"No propelling power or machinery of any sort should be used after it should prove to be a public nuisance." This provision fol-

lows immediately after the words that provide for the use of such power. Then it provides also that the street car company should connect with other street car companies, but they shall permit no locomotive, freight or passenger car, such as are usually run over the general railways of the state for the transportation of freight and passengers to be used unless authorized by the city council. It contemplates that even those may be used if authorized by the city council, "and that the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under section 3 of this ordinance shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon" between the
250 parties. There is some provision that they shall only allow cars of other tracks to come on their railway track that are propelled by such power as the Council——

Judge KOON: It is the earlier part of section 4, Judge. "Said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council." It is just above where you commenced to read.

The COURT: That is it. It does not confine them to cars that are run by animal and locomotive power but to such as may be authorized to be used on street railways by the city council: It contemplates that the city council may authorize different kinds of power to be used. I need not refer to the provisions of this ordinance in respect to the rates of fare, it has been discussed so much and is so well understood by counsel and anybody listening to the argument here. The provision is in short that the street railway company may fix the rate of fare, the rates that shall be paid for fare, but shall not charge more than five cents for each passenger. It also provides that the city council may, at the expiration of five years, and at terms of five years thereafter, fix the fare so that such sum shall be just and reasonable, providing it shall not reduce the fare below five cents over any one continuous line.

Now, that contract, as was said, was validated by the acts of the legislature of 1879, the counsel for defendant admits that it was a valid contract, and as long as the corporation of the com-
251 plainant continues, so far as it has not been changed by the parties, the ordinance of 1878 may properly be considered as to the power to be used, as it authorized the construction of a single railroad commencing at the intersection of Nicollet Avenue and 31st Street, and thence on First Avenue south, and thence from First Avenue South to Grant Street, thence from Grant Street to Nicollet Avenue, thence on Nicollet Avenue to the southern limits of the city, with all turnouts, switches and other appurtenances which may be convenient and necessary to operate such line of railway by animal, steam or other power; so that, notwithstanding the ordinance of 1875, the council assumed the power under that to authorize the use of other power upon specific portions of the street railway.

Of course, in this particular ordinance it reserved the right to prohibit the use of steam on any part of that line which it deemed

would subserve the public good by such prohibition, and that was also one of the ordinances which was validated by the act of March 4, 1879.

My construction of that contract is, so far as the power is concerned, that the street railway agreed to use either animal or pneumatic power in the running of the railway, but there was nothing in that contract which would prohibit both parties to that contract, the street railway and the city together, from changing that provision, and if they should find out that some other power was desirable to be used instead of either horse or pneumatic power, from agreeing that such power should replace the old power and be used instead.

252 In other words, there is nothing in that contract that makes it different from other contracts or which prohibits the parties to the contract, if they both agree, from changing it in any respect. The parties to the contract might change it by mutual agreement; but one party alone could not change it, of course, without the consent of the other.

Perhaps the only remaining proposition is whether this contract was changed by consent of the parties by the ordinance of September 19, 1890, which ordinance was accepted by the street car company, and which contained very many provisions which I need not refer to, because it is only claimed that this portion of the contract fixing the fare was changed by the 8th section of that ordinance, and which provided that, "in the construction, maintenance and operation of said lines of railway said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled "An Ordinance authorizing and regulating the street railways in the city of Minneapolis, passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force"—that is the original ordinance—"and all other ordinances of said city now in force, or hereafter adopted, so far as is applicable."

Now, it does not seem to me that this touches the rates of fare at all. It says "in respect to construction"—that is not fare. "Maintenance"—that is not fare. "And operation." That is, how the cars shall be run and what shall be done in respect to that by

253 the street railway company. The company shall be bound by the provisions of this original ordinance and other ordinances amendatory thereof, and all other ordinances of said city "now in force, or hereafter adopted, so far as applicable."

Now, that is true; so far as relates to construction, maintenance and operation of these lines the street car company is, by the provisions of this ordinance, and its acceptance of this ordinance, bound; and it is subject to all these things; but there is nothing in this that would bind it to that change as to fares nor permit the council to make such change, nor agree to be bound by any change that the council might thereafter make with reference to the right of the street railroad company to collect fares. That in the original ordinance is a distinct provision. It comes under section 8 of the original ordinance and is a separate provision in respect to fares and the right of the company to collect fares. This provision in section 8

of this ordinance of September 19, 1890, has no reference to fare at all, but has reference to other subjects, and it certainly is a rule which the most vague ideas of equity would consider necessary to be applied, that there should be no forced construction of language of that kind used to broaden it and extend it to subjects which, apparently, were not by the parties intended to be included under it. It must be plain that both parties would understand naturally the scope and meaning of a provision of that kind, as not re-
254 ferring to fares, and the language must be such that the court could say that the parties must have understood that it did cover the subject of fares, or else it does not cover that subject. If there were other ordinances which were proper to be referred to in such a way relating to the construction, maintenance or operation of the road, entirely different from a matter of fares, and this general statement that ordinances in the future might be passed relating to the same subject, and, so far as applicable, would be binding upon the company, but would not by any reasonable or fair or honest construction be held to include the provision of this original contract in respect to fares. That was too important a matter.

It seems to me that the general rule laid down by the Supreme Court of the United States in that Detroit case which has been cited on both sides is very clear on that subject. So in some other of the cases that have been cited. I think that the general and fair understanding applied to contracts would exclude any such thought as that the idea of the subject of fares was contemplated by anything stated in that section. Therefore, I shall hold that that section does not, and did not, authorize the city of Minneapolis on the 9th of February last, or now, or at any time, to change or legislate upon the question of what reduced fares the complainant was entitled to collect for its compensation for the carriage of passengers upon its cars.

The result of all this is that I think the injunction must issue as prayed for in the complaint. I have gone over the subject as far as seems necessary.

255 And on October 4th, 1907, the following decree was entered of record in said cause, to-wit:

256 United States Circuit Court for the District of Minnesota, Fourth Division.

Term Minutes, October Term, A. D. 1907, October 4th, 1907.

FRIDAY MORNING.

Court opened pursuant to adjournment.
Present: Honorable William Lochren, Judge. Honorable William S. Munger, Judge. Henry D. Lang, Clerk.

No. 755.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,
vs.
THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Decree.

The above entitled cause having come duly on to be heard upon the Amended Bill and Answer thereto with the stipulation of parties which said cause was heard upon said Amended Bill and Answer and stipulations, by consent of parties, and being fully argued
257 by counsel, and the Court being duly advised in the premises, and having heretofore rendered its decision herein, now, pursuant to said decision.

It is ordered, adjudged and decreed, That the complainant is a corporation organized under Title I, of Chapter 34 of the Statutes of Minnesota for the year 1866, with charter rights as alleged in said Amended Bill.

It is further ordered, adjudged and decreed That the ordinance of the city of Minneapolis passed on July 9th, 1875, and the ordinance of the city of Minneapolis passed on July 8th, 1878, as ratified and confirmed by the legislature of the State of Minnesota on the 4th day of March, 1879, constitute a contract between complainant and respondent for and during the terms of complainant's charter, as alleged in said Amended Bill; and that complainant is entitled to collect five cents from each passenger riding upon its cars, as provided in said ordinance of July 9th, 1875.

It is further ordered, adjudged and decreed That under and by virtue of the resolutions and ordinances of the city of Minneapolis passed on July 19th, 1889, September 6th, 1889, September 27th, 1889, January 17th, 1890, March 28th, 1890, and September 19th, 1890, set forth in complainant's Amended Bill, said complainant is authorized to operate its cars upon all its lines of street railway in the city of Minneapolis for and during the term of its charter, by electricity as a motive power, as alleged in said Amended Bill.

It is farther ordered, adjudged and decreed that the ordinance of the city of Minneapolis, set forth in said Amended Bill of Complaint and entitled "An Ordinance amending an ordinance entitled 'An

ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the city of Minneapolis by electricity,' approved September 22, 1890, as subsequently amended," which said last named ordi-
258 nance was passed by the Common Council of respondent on February 9, 1907, is null and void, for the reason that it impairs the obligations of said contract between complainant and the city of Minneapolis.

It is therefore further ordered, adjudged and decreed That the Clerk of respondent, and his successors, as well as said respondent, be perpetually enjoined from publishing said ordinance; and the city of Minneapolis, the Mayor, the Common Council of said city, and all officers, agents, attorneys, employes, representatives, departments of said city and their respective agents, representatives and employes, and the corporation attorney of said city, his associates and assistants and their respective successors in office, be and they are perpetually enjoined, restrained and prohibited from putting said alleged ordinance into effect, or attempting so to do, and from instituting or authorizing, or directing any suit or suits, action or actions, or any proceeding against the complainant, or any conductor or employé, or any officer, representative or agent of the complainant, the object or purpose of, or relief, sought by said action, suit or proceeding being to put said alleged ordinance into effect, or to enforce any of its provisions; or to compel the complainant, or any officer, representative, conductor or agent of it to sell or issue any tickets, as therein required, or to accept any cash fare or any other kind of a fare less than five cents, as therein provided; and from making complaint for violation of said ordinance, or any part thereof; and from instituting or prosecuting any action or proceeding for violation of said alleged ordinance, or any part thereof, whether complaint be made or said action be instituted by or on behalf of said city of Minneapolis or any other persons; and from instituting directing, authorizing or asking leave to institute or proceed with any suit, act or proceeding for the recovery of any fine, penalty, or forfeiture for violating said ordinance, or any part thereof.

259 It is further ordered, adjudged and decreed That the city of Minneapolis pay the costs of this action, taxed at $— for which execution is awarded.

Dated this 4th day of October, A. D. 1907.

WM. LOCHREN.

(Endorsed:) Filed October 4th, 1907. Henry D. Lang, Clerk, By Margaret C. Noonan, Deputy.

260 And on November 23rd, 1907, the following assignment of errors was filed of record in said cause, to-wit:

261 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

Assignment of Errors.

In connection with the petition for an order allowing appeal and the appeal of the respondent in the above entitled matter, said respondent makes the following assignment and specification of errors:

(1) The Court erred in finding, adjudging and decreeing that the complainant is, or ever was, a corporation organized under Title I of Chapter 34 of the Statutes of Minnesota for the year 1866.

(2) The Court erred in finding, adjudging and decreeing that complainant has, or ever had, the charter rights as alleged in the Amended Bill of Complaint.

(3) The Court erred in not finding, adjudging and decreeing that complainant was organized as a corporation under Title II of Chapter 34 of the Statutes of Minnesota for the year 1866 and subsequent acts amendatory thereof and that the term of its corporate existence was thirty years from July 1st, 1873.

(4) The Court erred in finding, adjudging and decreeing that the Ordinance of the City of Minneapolis, passed July 9th, 1875, and the Ordinance of the City of Minneapolis, passed on July 8th, 1878, as ratified and confirmed by the legislature of the State of Minnesota, on the 4th day of March, 1879, constituted a contract between complainant and respondent for and during the term of fifty years.

262 (5) The Court erred in finding, adjudging and decreeing that complainant is entitled to collect five cents for each passenger riding upon its electric street cars, either as alleged in the Amended Bill of Complaint or otherwise.

(6) The Court erred in finding, adjudging and decreeing that under and by virtue of the resolutions and ordinances of the city of Minneapolis, passed on July 19th, 1889, September 6th, 1889, September 27th, 1889, January 17th, 1890, March 28th, 1890 and September 19th, 1890, the complainant is authorized or empowered to operate its cars upon all or any of its lines of street railway in the city of Minneapolis for any definite term of time, by electricity as a motive power, as alleged in the Amended Bill of Complaint, or otherwise.

(7) The Court erred in finding, adjudging and decreeing that there is or ever was any contract between complainant and respondent with reference to the construction, maintenance or operation of an electric street railway in, upon or over the streets of the city of Minneapolis.

(8) The Court erred in finding, adjudging and decreeing that the ordinance of the City of Minneapolis, set forth in the Amended Bill of Complaint and entitled "An ordinance amending an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the city of Minneapolis by electricity approved September 22nd, 1890, as subsequently amended" passed February 9th, 1907, is null and void, as impairing the obligations of any contract between complainant and respondent.

(9) The Court erred in not dismissing the Amended Bill of Complaint.

(10) The Court erred in ordering, adjudging and decreeing that the respondent and its clerk and his successors in office be restrained and enjoined from ever publishing said ordinance of Febru-
263 ary 9th, 1907, as required by its City Charter.

(11) The Court erred in ordering, adjudging and decreeing that the respondent, its mayor, common council, and all its officers, agents, attorneys, employees, representatives, and its various departments, their agents, representatives and employees, be perpetually enjoined, restrained and prohibited from putting said ordinance of February 9th, 1907, into effect, or attempting so to do, and from instituting, or authorizing or directing any suit, or suits, action, or actions, against the complainant, its conductors, employees, officers, representatives and agents, to enforce said ordinance of February 9th, 1907.

(12) The Court erred in ordering, adjudging and decreeing that said respondent, and all its officers, agents and representatives be restrained and enjoined from enforcing, or attempting to enforce, compliance with said ordinance of February 9th, 1907, on the part of the said complainant.

(13) The Court erred in not dismissing said Amended Bill of Complaint for want of jurisdiction.

(14) The Court erred in holding, adjudging and decreeing that any federal question or issue was raised or presented by the said Amended Bill of Complaint.

Wherefore, respondent prays that the judgment and decree entered by the court in the above entitled cause may be reversed according to the prayer and petition of the appeal herein filed.

Dated this 11th day of November, A. D. 1907.

FRANK HEALY,
Attorney and Solicitor for Respondent.
WM. A. LANCASTER,
JOHN F. McGEE,
Of Counsel for Respondent.

Endorsed: Filed Nov. 23, 1907. Henry D. Lang, Clerk, By Geo. F. Hitchcock, Jr., Deputy.

264 And on the same day the following petition for appeal and order of allowance thereon was filed of record in said cause, to-wit:

18—234

265 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

The above named respondent, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 4th day of October, A. D. 1907, hereby appeals from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and prays that appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner prays that said order and decree may be reviewed and reversed.

CITY OF MINNEAPOLIS,
By FRANK HEALY,
Its Attorney and Solicitor and City Attorney of said City of Minneapolis.
WM. A. LANCASTER,
JOHN F. McGEE,
Of Counsel.

The foregoing petition for appeal is granted and the claim for appeal therein made is allowed.
Dated this 23rd day of November, A. D. 1907.

WM. LOCHREN, *Judge.*

Endorsed: Filed Nov. 23 1907. Henry D. Lang, Clerk, By Geo. F. Hitchcock, Jr., Deputy.

266 And on the same day the following stipulation waiving the giving of a bond on appeal was filed of record in said cause, to-wit:

267 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

It is hereby stipulated in the above entitled action that in case the respondent, the City of Minneapolis, shall decide to take an appeal, the complainant waives the giving of any bond therein, and

that said appeal may be allowed without the giving of any bond, as required by law.

Dated this 20th day of November, A. D. 1907.

M. D. MUNN.
N. M. THYGESON.
KOON, WHELAN & BENNETT,
Of Counsel.
FRANK HEALY,
Attorney for Respondent.
LANCASTER & McGEE, *Of Counsel.*

Endorsed: Filed Nov. 23, 1907. Henry D. Lang, Clerk, By Geo. F. Hitchcock, Jr., Deputy.

268 And on the same day the following citation, with admission of service thereon, was filed of record in said cause, to-wit:

269 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Minneapolis Street Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the Circuit Court of the United States, District of Minnesota, Fourth Division, wherein the City of Minneapolis is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 23rd day of November, A. D. 1907, and of the Independence of the United States the one hundred and thirty-second.

WM. LOCHREN, *Judge.*

Due and personal service of the within citation is hereby admitted at Minneapolis, Minnesota, this 23rd day of November, A. D. 1907.

M. D. MUNN.
N. M. THYGESON.

KOON, WHELAN & BENNETT,
Of Counsel.

270 [Endorsed:] No. 755. United States Circuit Court, District of Minnesota, 4th Division. Minneapolis Street Ry. Co. *vs.* The City of Minneapolis, Defendant. Citation. Filed November 23, 1907. Henry D. Lang, Clerk, By Margaret C. Noonan, Deputy.

271 And on December 17th, 1907, the following præcipe for return to the Supreme Court of the United States was filed of record in said cause, to-wit:

272 United States Circuit Court, District of Minnesota, Fourth Division.

MINNEAPOLIS STREET RAILWAY COMPANY, a Corporation, Complainant,

vs.

THE CITY OF MINNEAPOLIS, a Municipal Corporation, Respondent.

To the clerk of the above named court:

Please make a return on appeal to the Supreme Court of the United States in the above entitled cause consisting of the following papers; Amended Bill of Complaint, Answer to Amended Bill, Stipulation as to Special Laws and Charter, Court Proceedings, Oral Decision of Judge Lochren, Decree, Assignment of Errors, Petition for Appeal and Order Allowing Same, Stipulation Waiving Bond on Appeal, and Citation.

Dated, December 17th, 1907.

FRANK HEALY,
City Attorney of Minneapolis and Attorney and Solicitor for Respondent.
LANCASTER & McGEE,
Of Counsel for Respondent.

(Endorsed:) Filed Dec. 17, 1907. Henry D. Lang, Clerk, by Geo. F. Hitchcock, Jr., Deputy.

273 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Fourth Division.

I, Henry D. Lang, Clerk of said Circuit Court, do hereby certify and return to the Honorable the Supreme Court of the United States, that the foregoing, consisting of 272 pages, numbered consecutively from 1 to 272 inclusive, is a true and complete transcript of the following Records, Process, Pleadings, Orders, Final Decree and proceedings in said cause, viz: Amended Bill of Complaint, Answer to Amended Bill, Stipulation as to Special Laws and Charter, Court Proceedings, Oral Decision of Judge Lochren, Decree, Assignment of Errors, Petition for Appeal and Order Allowing Same, Stipulation Waiving Bond on Appeal, and Citation, and of the whole thereof, as appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at Minneapolis, in the District of Minnesota, this 17th day of December, A. D. 1907.

[Seal U. S. Circuit Court, Fourth Division, Dist. of Minnesota.]

HENRY D. LANG, *Clerk*,
By GEO. F. HITCHCOCK, JR., *Deputy*.

Endorsed on cover: File No. 20,952. Minnesota C. C. U. S. Term No. 234. The City of Minneapolis, appellant, *vs.* The Minneapolis Street Railway Company. Filed December 30th, 1907. File No. 20,952.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

NUMBER 46.

THE CITY OF MINNEAPOLIS,
Appellant,

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,
Appellee.

Appellant's Brief.

STATEMENT OF CASE.

This is an appeal from a judgment or decree entered by the United States Circuit Court, District of Minnesota, on October 4, 1907. (See page 134, Transcript of Record).

On February 9, 1907, the City Council of the City of Minneapolis, passed an ordinance providing that the Minneapolis Street Railway Company should sell, and provide for the sale of, tickets, each good for transportation of one passenger for a continuous passage over the street railway lines of said company in said city, at the rate of not less than six tickets for twenty-five cents (See page 27, Transcript of Record).

This ordinance was approved on the 18th day of February, 1907. Before the same had been published, and on the 20th day of February, 1907, the Minneapolis Street Railway Company filed its Bill of Complaint against the City of Minneapolis for an injunction against the publication of said ordinance and the putting of the same into effect, upon the alleged ground that the same would be a violation of the City's contract with the Minneapolis Street Railway Company, contained in the ordinance of July 9, 1875 (See page 3, Transcript of Record), as confirmed by the act of the legislature of the State of Minnesota of 1879.

A restraining order against such publication was issued on the same day.

On May 6, 1907, the defendant duly filed its answer.

On May 31, 1907, the street railway company filed an amended Bill (See Transcript of Record, pages 1 to 31, both inclusive).

On July 1, 1907, the City of Minneapolis, filed its amended answer.

On August 20 to 24th, 1907, the case was heard before the Honorable William Lochren, District Judge, on Bill and Answer.

On August 24, 1907, the decision was announced, as the same appears on pages 122 to 133, both inclusive, of Transcript of Record.

On October 4, 1907, the judgment and decree from which this appeal was taken, was entered (See pages 134, 135 Transcript of Record).

On November 23, 1907, the City of Minneapolis

filed its petition for an appeal and assignment of errors; and, on the same day, an order allowing said appeal, was granted (See page 128, Transcript of Record).

Citation to the Minneapolis Street Railway Company on appeal was duly issued on said 23rd day of November, 1907, and duly served upon the attorneys for said Minneapolis Street Railway Company on the same date.

It is alleged in the Amended Bill of Complaint that, the complainant was organized as a corporation on July 1, 1873, for a period of *fifty years* from said first day of July.

The articles of incorporation which, under the general laws of Minnesota, stand as its charter, is an exhibit to the complaint, and appears on page 32, Transcript of Record.

It is also alleged that complainant's life, as a corporation, has been duly extended until March 1, 1937.

Complainant also alleges that *"it was organized for the purpose and with the power of owning and operating street railway lines within said City of Minneapolis, and the building, owning and operating of railroads within Hennepin County, Minnesota. That it now owns and operates various lines of street railway, hereinafter in this Bill more particularly set forth."*

This allegation, as to its power, is, it will be noticed, at variance with the language of article First of its articles of incorporation (See page 32, Transcript of Record).

It is alleged that on the 9th day of July, 1873, an ordinance, authorizing and regulating street railways in the City of Minneapolis, was passed and later was accepted in writing by the complainant; and that such ordinance and its acceptance, together with an act of the legislature confirming the grant of the City of Minneapolis to the Minneapolis Street Railway Company, passed March 4, 1879, constitutes a contract between the parties to this litigation, which the ordinance of February 9, 1907, will impair.

The act of March 4, 1879, appears on page 9, Transcript of Record.

On the 19th day of September, 1890, the City of Minneapolis passed "An Ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis, by electricity." This ordinance is set out in full (excepting its title as above given), on pages 19, 20 and 21, Transcript of Record.

It is alleged that the complainant accepted said ordinance and has since complied with the provisions of the same.

It affirmatively appears from the Bill and Answer that the complainant originally constructed and operated a horse street railway line; and that such horse street railway line, becoming inadequate and obsolete in the year 1890, the complainant commenced the construction, under the last named ordinance, of electric lines, and has since operated such electric lines in the City of Minne-

apolis—building *new* ones from time to time and extending the *old ones.*

It appears affirmatively that there are now no horse street railways in the City of Minneapolis. The complainant is operating nothing but electric street railway lines therein.

The particular provision of the ordinance of July 9, 1875, relied upon as constituting a contract with reference to fare, is Section 8, thereof (See bottom page 5, Transcript of Record).

The important part of that section is as follows:

> "Provided, further, that the City of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the City Council of said city may deem just and reasonable; provided that the city shall not reduce the passenger's fare below five cents, over any one continuous line, and what shall be considered a continuous line may be designated by the City Council of the said city, but that said Council shall not designate any such continuous line to be more than three miles in length."

The lower Court held with the complainant upon all the points contended for, to-wit:

First: That the complainant was properly organized as a *railway* corporation under Title I, Chapter 34, Statutes of Minnesota, Revision 1866; and that the term of its charter is fifty years; and that it has all the charter rights alleged in the Amended Bill.

Second: That the Ordinance of July 9, 1875, as confirmed by the Legislature of the State of Minnesota, on the fourth day of March, 1879, constitutes a contract between complainant and respondent with reference to complainant's *electric* lines, and that complainant is entitled to collect five cents from each passenger riding upon its electric cars as provided in the Ordinance of July 9, 1875.

Third: That complainant is authorized by the Ordinance of September 19, 1890, to operate its cars upon all the lines of street railway in the City of Minneapolis for the *term of its charter by electricity as a motive power;* and

Fourth: That the Ordinance of February 9, 1907, with reference to selling six tickets for a quarter is null and void.

It will be noticed that the decree or judgment from which this appeal is taken, is a sweeping one, and absolutely concludes the appellant upon every issue involved in the case.

The four important paragraphs of the judgment are here given in full:

> (*a*) "It is ordered, adjudged and decreed, That the complainant is a corporation organized under Title I, of Chapter 34 of the Statutes of Minnesota for the year 1866, with charter rights *as alleged in said Amended Bill.*"
>
> (*b*) "It is further ordered, adjudged and decreed, That the ordinance of the city of Minneapolis passed on July 9th, 1875, and the ordinance of the city of Minneapolis passed on July 8th, 1878, as ratified and confirmed by

the legislature of the State of Minnesota on the 4th day of March, 1879, constitute a contract between complainant and respondent for and during the *terms* of complainant's charter, as alleged in said Amended Bill; and that complainant is entitled to collect five cents from each passenger riding upon its cars, *as provided in said ordinance of July 9th,* 1875."

(*c*) "It is further ordered, adjudged and decreed, That under and by virtue of the resolutions and ordinances of the city of Minneapolis passed on July 19, 1889, September 6th, 1889, September 27th, 1889, January 17th, 1890, March 28th, 1890, and September 19th, 1890, set forth in complainant's Amended Bill, said complainant is authorized to operate its cars upon all the lines of street railway in the city of Minneapolis *for and during the term of its charter, by electricity as a motive power, as alleged in said Amended Bill.*"

(*d*) "It is further ordered,, adjudged and decreed that the ordinance of the city of Minneapolis, set forth in said Amended Bill of Complaint and entitled 'An Ordinance amending an ordinance entitled 'An Ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks, and to operate all its railway lines in the city of Minneapolis by electricity,' approved September 22, 1890, as subsequently amended," which said last named ordinance was passed by the Common Council of respondent on February 9, 1907, is null and void, for the reason that it impairs the obligations of said contract between complainant and the city of Minneapolis." (See pages 134, 135, Transcript of Record).

It will be noted that by the second paragraph cited, the contract referred to continues *"during the terms of complainant's* charter, as alleged in

said Amended Bill."

The Amended Bill shows (See page 2, Transcript of Record) that the terms of complainant's charter extend to March 1, 1937. This will doubtless afford a basis for contention on the part of the complainant that its contract is now determined to be not merely for fifty years but until March 1, 1937.

By the third paragraph of the judgment, just cited, it is *conclusively established that complainant has the absolute right to operate all its lines of street railway, for a fixed term,* by electricity, as alleged in the Amended Bill. In other words, it is conclusively established by this judgment that the City of Minneapolis by the Ordinance of September 19, 1890, *made an irrevocable grant,—when it is conceded that the city has never been invested with any such power by the legislature.*

SPECIFICATION OF ERRORS.

The decree, from which this appeal is taken, is alleged to be erroneous in the following particulars, to-wit:

I.

In that, it is ordered, adjudged and decreed that the complainant in this case is a corporation organized under Title I, Chapter 34, of the Statutes of Minnesota, Revision of 1866, with charter rights as alleged in said Amended Bill.

II.

In that, it is ordered, adjudged and decreed that the ordinance of the City of Minneapolis passed on July 9, 1875, and the ordinance of the City of Minneapolis, passed on July 8, 1878, as ratified and confirmed by the Legislature of the State of Minnesota on the 4th day of March, 1879, constitute a contract between appellant and respondent for and during the terms of complainant's charter, as alleged in said Amended Bill, with reference to the electric street railway system which complainant is operating.

III.

In that, it is ordered, adjudged and decreed that complainant is entitled to collect five cents from each passenger, riding upon its cars, as provided in said Ordinance of July 9, 1875.

IV.

In that, it is ordered, adjudged and decreed that under and by virtue of the resolutions and ordinances of the City of Minneapolis, passed on July 19, 1889, September 6, 1889, September 27, 1889, January 17, 1890, March 28, 1890 and September 19, 1890, as set forth in complainant's Amended Bill, said complainant is authorized to operate its cars upon all its lines of street railway in the City of Minneapolis, for and during the term of its

charter, by electricity as a motive power as alleged in said Amended Bill.

V.

In that, it is ordered, adjudged and decreed that the ordinance of the City of Minneapolis, set forth in said Amended Bill of Complaint, entitled, "An ordinance amending an ordinance entitled 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity,'" approved September 22, 1890, as subsequently amended, which said last named ordinance was passed by the Common Council of appellant on February 9, 1907, is null and void, for the reason that it impairs the obligations of the contract held to exist between complainant and the City of Minneapolis.

VI.

In that, it is ordered, adjudged and decreed that the appellant be perpetually enjoined from publishing said ordinance of February 9, 1907, or from enforcing, or attempting to enforce, the same.

ARGUMENT AND AUTHORITIES.

The principal and vital question presented by the record in this case for determination is, whether the Minneapolis Street Railway Company has a *contract right* for fifty years from July 1, 1873, (or, as the judgment would seem to hold until March 1, 1937) to charge a fare of *five cents* for each *continuous ride* of not exceeding *three miles in length,* on its *electric* lines.

A.

The contention of the Appellee is that, under the law, as it existed at the date of its incorporation in the year 1873, it had the right to incorporate, and did, in fact, incorporate as a *railroad* company under Title I of Chapter 34, Statutes of the State of Minnesota, Revision 1866. (See Appendix, pages 1 to 21).

The Appellant's first contention is that, a corporation for the purpose of constructing and operating a street railway could not have been formed under said Title I, in the year 1873, but could have been incorporated, and, in fact, was incorporated, under Title II of the same chapter, as amended by Chapter 23, of the General Laws of 1868, and by Chapter 13, General Laws of Minnesota for the year 1873. (For Title II and amendments, see Appendix, pages 22 to 28).

If Appellant's contention be correct, it compels a reversal of the decree appealed from, and renders

unnecessary any discussion of the other questions involved.

Inasmuch as under Title I, a corporation could be organized for a period not exceeding fifty years, while under Title II a corporation could only be organized for a period not exceeding thirty years, if complainant was organized under Title II, the *term* of its contract expired on *July 1, 1903.*

The rights and privileges granted to the complainant by the Ordinance of July 9, 1875, are expressly limited to the *term of its charter,* to-wit: either *thirty* or *fifty* years, depending upon whether the complainant was organized under Title II or Title I, Chapter 34, Revision 1866.

B.

The Appellant's second contention is that, if Appellee's construction of the law be upheld in this Court, as to the term of its charter, the only franchise granted to the respondent by the Ordinance of July 9, 1875, confirmed by the act of the legislature in 1879, was one to construct, maintain, and operate a *horse* street railway and nothing else. And that, when in the year 1890, the horse street railway had become inadequate, obsolete and practically useless, and had to be abandoned, it was necessary to obtain an *electric* street railway franchise. Consequently, all the rights and priviliges which the complainant is now asserting with reference to its *electric* street railways, must necessarily, depend upon the Ordinance of September

19, 1890. That ordinance has never been confirmed by act of the legislature.

C.

Appellant's third contention is that, even if Appellee could base any so-called contract rights upon the unconfirmed Ordinance of September 19, 1890 (the electric street railway ordinance), still the power of the City Council exercised in the passage of the Ordinance of February 9, 1907 (the one complained of as impairing the obligation of contract) is one expressly reserved to it by Section VIII of that ordinance. It reads as follows:

> "In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns shall, at all times, be subject to all the *conditions* and *limitations* and other *provisions* of an ordinance, entitled, 'An Ordinance authorizing and regulating street railways in the City of Minneapolis, passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable."

It is Appellant's contention that, the Ordinance of September 19, 1890, is the only ordinance which authorizes, or purports to authorize, the construction and operation by the Appellee of an electric street railway line in the streets of the City of Minneapolis. And further that, no part of the Ordinance of July 9, 1875, is incorporated into that ordinance, *excepting so far as such application* is

expressly made by Section VIII.

That section simply provides that the *Minneapolis Street Railway Company,* its successors and assigns shall, at all times, be *subject* to all the conditions, limitations and other provisions, etc. This language is unilateral and imposes upon the company alone the obligations of the old ordinance. It does not impose, nor does it purport to impose, any of the obligations of the old ordinance upon the City of Minneapolis. Such conditions and limitations and other provisions as existed in that ordinance and in later ordinances, and those which the City Council may enact, must, by the express language of that section, govern the Minneapolis Street Railway Company with reference to its electric street railway lines.

The ordinance excepting the title, from which Section VIII is quoted, appears on pages 72 to 74, Transcript of Record.

It was practically conceded by the Appellee, at the hearing in the lower court, that, at the time of the passage of the Ordinance of July 9, 1875, the City of Minneapolis had no authority or power delegated to it by the legislature to enter into a contract with the Appellee or to make to it an irrevocable grant. It was only when the legislature of the State of Minnesota, on March 4, 1879, validated such ordinance, that it became a contract. This act of confirmation appears in full on page 9, Transcript of Record.

The charter of the City of Minneapolis forms Chapter 76 of the Statutes of Minnesota for the

year 1881, and expressly provides that "This charter shall be a public act and need not be pleaded or proved in any case, also no law of the State contravening the provisions of this act, shall be considered as impairing, amending or modifying the same, unless such purpose be expressly set forth in such law." (See stipulation on pages 116 and 117, Transcript of Record).

Section 1, Chapter 76, Special Laws 1881, provides that the City of Minneapolis "shall have all the general powers possessed by municipal corporations at common law, and, in addition thereto, shall possess all power hereinafter specifically granted."

Section 1 of Chapter 8, of the charter, provides that, "The City Council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city, and may lay out and open new streets and alleys, and extend, widen, and straighten any that now exist, or which may hereafter exist; also for the purpose of drainage, construction of bridges or making other necessary public improvements, or for the improvement or health or sanitary condition of the people of said city, to enter upon, lower, raise, change the course of or divert any stream of water (except the Mississippi River) or any ditch or drain within the limits of said city; and may build, maintain and repair bridges across streams or railway tracks; may provide for the embankment of gulleys or roadbeds or any street or alley."

Section II empowers the Council to establish grades of the same; while Section III authorizes vacation of highways, streets, lanes or alleys or any portion of the same.

There is not now, and never has been, vested in the City Council of the City of Minneapolis, power or authority, by ordinance or otherwise, to enter into a contract with an individual or corporation to occupy and use the streets for street railway purposes. That the general provisions with reference to the care and control of the streets do not confer such power, was expressly determined, twenty-two years ago, by the Supreme Court of the State of Minnesota, in the case of *Nash v. Lowry*, 37 Minn. 261.

In that case, the Court, speaking of an ordinance passed under such general power, said:

> "The ordinance, when passed, was invalid as an irrevocable contract; for it is undoubtedly the rule, in accordance both with principle and authority, that a municipal corporation, instrusted with power of control over public streets, cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the state. Cooley, Const. Lim. 252; 1 Dill Mun. Corp. Sections 715, 716, and cases cited.
>
> "But when the ordinance was 'confirmed and validated' by the act of 1883, it became as valid and binding as though when passed, the council had express authority to pass it. From that time the power of the council to recall the rights granted, ceased."

The rule thus laid down by the Supreme Court of the State of Minnesota in *Nash v. Lowry*, is also the settled law of this Court.

People's Railroad v. Memphis Railroad, 10 Wallace, 38, 52.

In the latter case it was said:

> "It is quite clear that the municipal authorities of the city possessed no such power as is supposed by the respondents. Such corporations are usually invested with the power to lay out, open, alter, repair, and amend streets within the corporate limits; but the rule is well settled, that by virtue of those powers, without more, they cannot grant to an association of persons the right to construct and maintain for a term of years a railway in one of the streets of the municipality for the transportation of passengers for private gain, and that an ordinance or resolution of the authorities granting such a right is void.
>
> "Special powers are given to such corporations to lay out, open and repair streets as a trust to be held and exercised for the benefit of the public, from time to time, as occasion may require, and the general rule is, that those powers cannot be delegated to others, nor be effectually abridged by any act of the municipal corporation without the express authority of the legislature."

We do not feel that it is necessary to pursue this point further, inasmuch as it was conceded at the argument by Appellee's counsel that, in the absence of the act of confirmation of March 4, 1879, the ordinance of July 9, 1875, would not have constituted a contract for want of power in the City of Minneapolis to enter into such contract. This admission with reference to lack of power in 1875

must hold good in 1890, for the City of Minneapolis had no other or greater power delegated to it by the legislature of Minnesota in 1890, than it had in 1875. If the city lacked the power to enter into a binding contract in 1875, it also lacked the power to enter into a binding contract on September 19, 1890.

The gist of appellant's contentions may be briefly summarized as follows:

If the term of complainant's charter terminated at the end of thirty years from July 1, 1873, then the alleged contract arising out of the provisions of the Ordinance of July 9, 1875, as confirmed by the act of the Minnesota Legislature in 1879, terminated at the same time; or, if the corporate term be conceded to have been fifty years, then the franchise to operate that complete thing, known as a horse street railway, in the streets of the City of Minneapolis, came to an end when the old horse street railway became obsolete and was abandoned. And, since the City of Minneapolis had no greater power to enter into a contract with the complainant, with reference to the use of the streets for an *electric* street railway, in September, 1890, than it had in July, 1875, it did not enter into a binding contract with the complainant at the time of the passage of the electric street railway ordinance of September 19, 1890; and, if it did not, and could not, enter into such a contract at that time, or at any other time since 1875, then there is no contract in existence, and, of course, no contract the obligation of which could be impaired by the ordi-

nance complained of in the Bill, to-wit: the Ordinance of February 9, 1907, and, therefore, the complainant had no standing in the Court below, and its Bill should have been dismissed and the decree in its favor should be here reversed and set aside.

We will take up the three main points in their order:

I.

WAS THE COMPLAINANT ORGANIZED AS A RAILWAY CORPORATION UNDER THE PROVISIONS OF TITLE I, CHAPTER 34, STATUTES OF MINNESOTA REVISION 1866, AND WAS "THE TERM OF ITS CHARTER FIFTY YEARS"; OR WAS THE COMPLAINANT ORGANIZED UNDER TITLE II, CHAPTER 34, STATUTES OF MINNESOTA, REVISION 1866, AS AMENDED BY CHAPTER 23 OF THE GENERAL LAWS OF 1868 AND BY CHAPTER 13 OF THE GENERAL LAWS OF 1873, AND WAS THE TERM OF ITS CHARTER NECESSARILY LIMITED TO THIRTY YEARS?

If, as before stated, it should be held that the complainant was organized under said Title II, then a determination of the other questions involved in this controversy becomes wholly immaterial, for the reason that there was no contract in existence at the time when this Bill of Complaint was filed, the term of the contract having expired on July 1, 1903.

Titles I and II, of Chapter 34, Statutes of Minnesota, Revision 1866, appear in the appendix to this brief, pages 1 to 25, as well as the amendments of 1868 and 1873 to said Title II.

We here call special attention to these amendments, for the reason that it is obvious that the learned Judge of the lower court did not have these amendments in mind; in fact, could not have had them in mind, for he assumes that if the complainant could not have been organized under Title I, it could not have been organized at all. (See top of page 127, Transcript of Record).

The lower court held that the complainant, although organized for the purpose of constructing and operating street railways only, could be organized under Title I as a railway,—in other words, it was squarely held that the general term "railway" as used by the legislature of the State of Minnesota in the year 1866, was intended to include, and did include, street railways.

The reasoning of the lower court as disclosed by the decision which appears on pages 122 to 133, Transcript of Record, is based upon the following propositions:

(a) There must have been some statute under which the complainant company could be organized as a corporation;

(b) It could not be organized under Title II, for street railways are not *mentioned* or *included* therein.

(c) It could be organized under Title I, as street railways fall under the head of railways and are *included* in that term.

(d) If it could not thus be treated as a railroad, it must fall under the head of "works of internal improvement which require the taking of private property or any easement therein."

We respectfully submit that all of the foregoing propositions are unsound and erroneous.

In the first place it is assumed by the learned Judge of the lower court that, if this complainant could not be organized under said Title I, it could not be incorported at all under the Statutes of Minnesota, as they stood on the 23rd day of June, A. D., 1873, the date of its incorporation.

And again it is assumed that the incorporation of this complainant must be authorized under one or the other of these Titles. This, of course, is erroneous, unless it be assumed that, at that time, the State of Minnesota, had provided for the incorporation of any and all conceivable enterprises. As a matter of fact, railroads and many other enterprises, prior to the year 1881, when the constitutional amendment against the passage of special charters went into effect, were organized under *special acts* of the legislature.

An examination of the Statutes of Minnesota from the earliest times and of the decisions of the Supreme Court of the State of Minnesota, conclusively demonstrates that the terms "railroad" and "railway" are, and always have been, synonymous, and that neither term, in general legislature, has ever been intended to include anything but the ordinary steam railway of commerce.

The Public Statutes of the State of Minnesota from 1849 to 1858, both inclusive, were compiled in the year 1859 by commissioners appointed by the State; and those statutes are designated as "Statutes of Minnesota, 1849--1858."

It is a significant fact that the act to provide for the incorporation and regulation of railroad companies was passed August 12, 1858, and appears on pages 319 to 324 of the above mentioned compilation.

Section I of that act provides as follows:

> "That any number of persons not less than five, associating for the purpose of constructing a railroad, shall subscribe a statement which shall specify as follows:"

Then follows a statement of the things necessary to incorporate a railroad company.

The subsequent sections of the statute show unmistakably that they are intended to apply, and, in fact, are only applicable, to commercial steam railroads.

This Act of August 12, 1858, is the beginning or nucleus of said Title I, Chapter 34, Revision 1866.

Section IX of said Act of August 12, 1858, provides for the exercise of the right of eminent domain by railroad companies; and it is the only section in the statute authorizing the exercise of that right.

There was in the Compilation of 1849-1858, as well as in the Revision of 1866, no general chapter devoted to eminent domain. Railroad companies and plank and turnpike road companies were the

only corporations authorized by the Statutes of 1849-1858, to exercise the power of eminent domain.

In the Statutes of 1849-1858, provision was made for the organization of particular companies, such as bridge companies, manufacturing, mechanical and chemical companies, and also such as emigrant aid societies, institutions of learning, gas-light companies, ferries, educational and charitable societies, city associations, medical and religious societies. In the Revision of 1866, these various provisions were all re-cast into Titles I, II, III, IV, V, VI and VII, of Chapter 34.

Section 1 of Title I, said Chapter 34, Revision of 1866, reads as follows:

> "Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein."

Said Title I, Chapter 34, has this heading:

> "Of corporations empowered to take private property for public uses."

Title II has this heading:

> "Of corporations for pecuniary profit other than those named in Title I."

Section XIII of said Title I, unmistakably refers to commercial steam railroads and telegraph companies, and to the right to overflow lands by dams, locks, sluices or other erections necessary to the prosecution of an enterprise; and also to the

condemnation of a right-of-way for a towpath for canal purposes. The right to condemn property is expressly withheld from manufacturing enterprises which may be incident to water powers. Practically all of the sections appearing in the act to provide for the incorporation and regulation of railroad companies, as they appear on pages 319 to 324, both inclusive, in the Statutes of Minnesota 1849-1858, re-appear in Title I, Chapter 34, Revision 1866.

In the Statutes of 1849-1858, only railroads are referred to. It seems impossible to say that these sections as they re-appear in the Revision of 1866, do not refer just as unmistakably to railroad corporations in the Revision, as they do under the specific head of railroad companies in the former statutes. The term "street railway" or "street railroad" nowhere appears in the Statutes of Minnesota until the Compilation of 1894.

In 1877, the Minnesota Legislature passed "An Act to define the liabilities of railroad companies in relation to damages sustained by their employes." This appears as Chapter 13 of the General Laws of Minnesota, 1877. It reads as follows:

> "Sec. 1. *Every railroad corporation* owning or operating a railroad in this state, shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part when sustained within this state, and no contract, rule or regulation between such corporation and any agent or servant shall impair or diminish such liability, provided that noth-

ing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent or servant while engaged in the construction of a new road, or any part thereof, not open to public travel or use.

Sec. 2. This act shall take effect and be in force from and after its passage."

In the case of *Funk, Administratrix, v. St. Paul City Railway Company*, 61 Minn., page 435, the claim was advanced that this abolished the fellow servant act as to all railways or railroads in the state, and that "every railroad corporation" and "any railroad company" necessarily included any and all street railways as well as commercial steam railways. We have quoted Chapter 13, Laws of 1877, in its entirety. There is, of course, nothing in this chapter in and of itself suggesting any limitation upon the terms "every railroad corporation" and "any railroad company." Those terms appear to be used in their generic sense, and, if so construed, would undoubtedly include street railways, either horse or electric or cable.

Furthermore, it will readily be seen that there is nothing in the language of this chapter, (which, in fact, consists of only one section), making it improbable or unlikely that the act did not apply to street railways. Obviously street railways, as well as steam railways, have agents and servants, and their agents and servants are liable to injuries in the operation of the cars. It is also obvious that such injuries may be frequently caused by the negligence of other agents or servants of the same company.

In 1877, when this act was passed, there were at least three cities in the State of Minnesota having street railways. These cities were Minneapolis, St. Paul and Duluth.

So far as we know, all commercial steam railways organized in the State of Minnesota prior to 1881, were organized under special charters granted to them by the legislature. The St. Paul Street Railway Company was organized under a special charter from the State, while the Minneapolis Street Railway Company was organized on June 23rd, 1873, under the provisions of the General Laws.

The question, as we have before stated, was squarely raised in the *Funk* case as to whether or not street railway corporations were to be included in the term "railroad" as used in the above quoted act. It was conceded by the Court that, technically speaking, the term railroad would include a street railway. But it was insisted that the true meaning of the word was to be determined *"from the general legislation upon the same subject matter."*

It was observed in passing that, prior to February 24, 1877, when the act in question was passed, there were no cable or electric street railways in existence in the State of Minnesota. The Court further added that, in determining the true intent of the fact, it *"must assume that the legislature was dealing with and acting upon facts within its knowledge."*

It was also stated that if the language used was so broad and explicit and so free from possible ambiguity as to include not only the *then known* but the *unknown thing* which might spring into existence in the future, it would doubtless cover and include such *unknown things* whenever they should arise.

The Court quoted from the case of *Bridge Proprietors v. Hoboken Company,* 1 Wallace, 116, as follows:

> "It does not follow that when a newly-invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. * * * The track upon which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that the roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it from any previous use of the word road. Some call the inclosure in which passengers travel on a railroad a coach, but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely, if ever, called coaches. It does not therefore follow that when a word was used in a statute or a contract 70 years since, that it must be held to include everything to which the same word is applied at the present day."

It quoted the following from *United States v. Union Pacific R. Co.*, 91 U. S., 72:

> "Courts, in construing a statute, may with propriety recur to the history of the times

> when it was passed; and this is frequently found necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."

Finally, the Court used this language:

> *"Through our territorial and state legislation, the term 'railroad' has acquired a definite and well-understood meaning, and it has never been understood to include street railways. It is usually applied to the ordinary steam railroad of commerce; and when there has been legislation in regard to street railways, they have been so designated."*

Again the Court held that the words "railroad" and "railway" are synonymous and interchangeable, citing as authority for this, *State v. Brin*, 30 Minn., 522.

The Court in the *Funk* case, on page 441, commented upon what would result if it were to be held that the term "railroad" included street railways, and pointed out what is obviously true, that, if such term should be held to so include street railways, such railways would be required to build depots and waiting rooms for passengers, and to do any number of other things which railroad companies are, by the specific provisions of the statute, required to do. Mr. Justice Mitchell, in a short concurring opinion, said:

> "The question is wholly one of legislative intent. Did the legislature intend to include street railroads within the provisions of the act?
>
> "In its original literal sense the word "railroad" means a road with rails laid on it; upon which the wheels of carriages or vehicles run.

> In this sense it would, of course, include street railroads. But according to common popular usage the word "railroad" without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight, and whenever street railroads are referred to, the word 'street' is prefixed. This is also the general legislative use of the words."

Then follows a statement by Judge Mitchell, which a careful examination of all the statutes of this State up to the time when this decision was rendered, to-wit, 1894, shows to be absolutely correct. It is as follows:

> *"In all the legislation of this state I have found no act (unless this be an exception) in which the word 'railroad' or 'railway' standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an act (unless this be an exception) which had reference to street railroads in which the word 'street' was not prefixed. I do not claim that there might not be a law enacted where it would be evident from its subject matter and object that the word 'railroad' was intended to include street railroads. But, in my opinion, this is clearly not such a case."*

This case was followed in the later case of *Lundquist v. Duluth Street Railway Co.*, 65 Minn., page 387.

In the case of *State v. Duluth Gas & Water Co. West Duluth Electric Co., Hartman General Electric Co., Duluth Water & Light Co., and Duluth Street Railway Co.*, 76 Minn., page 96, the Court

was called upon to pass upon the meaning of any "railroad company" as used in Chapter 11, General laws of Minnesota, for 1887. The act is entitled "An act for the taxation of railroad companies." It contains three sections and reads as follows:

> "Section 1. *Any railroad company* owning or operating or which may hereafter own or operate, any line or lines of railroad in this state, which has not accepted or become subject to sections one (1) and two (2) of chapter one hundred and eleven (111) of the special laws of eighteen hundred and seventy-three (1873), relative to taxation, or some special act or acts relating to taxation of the company accepting the same, shall become liable to pay, and shall pay a percentage of its gross earnings, in lieu of all other taxes in accordance with the provisions of the chapter hereinbefore referred.
>
> Sec. 2. No railroad or branch, or extension of a railroad in this state shall hereafter be opened for public use until the management thereof shall officially notify the railroad and warehouse commission that the same is finished and in a safe condition for operation. Within one year after such notification the railroad, branch or extension, shall file in the office of said commission a map and profile thereof, with table of grades, curvatures, and mileage, and a statement of the other characteristics of the road, certified by its president and engineer, in such form as the board may prescribe.
>
> Sec. 3. This act shall take effect and be in force from and after its passage."

On page 106 of the opinion, the Court said:

> "Assuming, without deciding, the validity of this act, it applies only to what are usually

known as ordinary commercial railways, and not to street railways. This is the practical construction which has always been placed on this statute by both the state and the street railway companies. The correctness of this construction was assumed without question by this Court in *State v. District Court*, 54 Minn., 34."

Again, the Court said:

"All through our statutes the legislature has *uniformly*, so far as we have discovered, used the word 'railroad' or 'railway' when unqualified, as referring exclusively to ordinary commercial railroads, while, on the other hand, when they have intended to refer to street railroads they have qualified the word 'railroad' by the prefix 'street.' See *Funk v. St. Paul City Ry. Co.*, 61 Minn., 435."

Again the Court said:

"Of late, street-railway companies have been gradually extending somewhat the sphere and character of their operations. This fact may render it somewhat difficult in some few cases to determine to which class a particular road belongs, but it does not obliterate the inherent difference between the main purposes and functions of the two classes."

It was insisted in this case that the Duluth Street Railway Company was authorized, by its articles of incorporation, and by special act (See Special Laws 1881, Extra Session c. 200) to build and operate not only street railways but suburban railways, and to carry freight as well as passengers:

The Court said:

"While the defendant may possess some unexercised powers not ordinarily conferred upon street railway companies, yet it is perfect-

> ly apparent that it is in all essential respects a '*street*' and not a 'commercial' railroad."

In a still later case, *City of Stillwater v. Thos. Lowry*, 83 Minn., page 275, it was contended that General Statutes 1894, Section 2642, which provides for agreements between municipalities and railroad companies as to the terms on which the latter might occupy any streets in the location of any part of its railroads, applied to street railroads as well as to commercial steam railroads. The Court, however, disposed of the matter as one already ruled by the *Funk* case previously cited.

It said:

> "This provision manifestly refers only to commercial steam railroads."

In 1866 there were steam railroads in the State of Minnesota. There were no street railways of any kind. There were no cities of sufficient size to warrant their introduction. It must be obvious at once that the legislature, in all human probability, had in mind only commercial steam railroads.

In the construction of statutory laws, it is frequently necessary to recur to the history of the country in order to ascertain the reason, as well as the meaning of the provisions in them.

Preston v. Browder, 1 Wheat. 115.

United States v. Union Pac. R. R. Co., 91 U. S. 79.

Platt v. Union Pac. R. R. Co., 99 U. S. 48.

Guaranty Insurance, Trust, etc. Co. v. Sellers, 123 U. S. 276.

Church of the Holy Trinity v. United States, 143 U. S. 457.

Smith v. Townsend, 148 U. S. 495.

Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 502.

If we recur to the history of the times and the situation as it existed in this State in 1866, it is not, we think, possible to reach the conclusion, that the trial Court in this case did reach, that it was in the legislative mind when it enacted Title I to provide for the incorporation of street railways.

The Territory of Minnesota was organized on the 3rd day of March, 1849, and was admitted to the Union as a State on May 11th, 1858.

In 1849, the total population of the State was 4,057.

In the year 1850, it had increased to 6,077.

In 1858, the population was 150,037.

In 1865 the population, according to the census of that year, was, 250,999.

St. Paul, the capital of the State, and then the largest city in the State, in 1850 had a population of 840.

In 1860, 10,600.

In 1865, 12,981.

In 1870, 20,300.

In 1880, 41,473.

In 1865, Minneapolis had a population of 4,607.

In 1870, Minneapolis had a population of 18,079.

In 1875, a population of 33,700; and in 1880, 46,887.

In 1873, when this complainant was organized, and in 1875, when the original ordinance of July 9, 1875 was passed, the city of Minneapolis contained only eleven square miles.

In the year 1866, with the exception of a few incomplete stub lines of commercial railway, there were no steam commercial railways in existence in the State of Minnesota.

To the north and west and northwest of Minneapolis and St. Paul, for hundreds of miles, was a howling Indian wilderness.

There was not a foot of street railway in the State, nor on the continent west of the Mississippi River, with the possible exception of the Cities of St. Louis and San Francisco, and not a foot in the United States outside of eight or ten of the principal cities, and in these cities were only the now antiquated and obsolete horse car lines.

In the statutory construction what is sought is, the intent existing in the legislative mind when a particular piece of legislation was enacted. And in the case at bar, the question is, "Was it the intent of the legislature that enacted Title I of Chapter 34, in the year 1866, to authorize the formation of corporations for the purpose of constructing and operating street railways in the State of Minnesota?"

Was it intended to invest street railways with the power of eminent domain?

THE PROVISIONS OF TITLE I CHAPTER 34 REPEL THE IDEA THAT SECTION 1 WAS INTENDED TO AUTHORIZE THE FORMATION OF CORPORATIONS FOR STREET RAILWAY PURPOSES.

Section 1 authorizes the formation of corporations "for the purpose of building, improving and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property for any easement therein."

Sections 2 and 3 provide for the organization of corporations and prescribe what shall be stated in the articles of incorporation.

Section 4 provides for the filing and publishing of the articles of incorporation.

Section 5 provides that no corporation shall be formed to continue for more than fifty years in the first instance.

Section 6 requires a copy of the by-laws of the corporation, with the names of all its principal officers appended thereto, to be posted in the principal place of business of the corporation and to be subject to public inspection.

Section 7 requires that a statement of the amount of the capital stock subscribed, the amount of capital actually paid in, and the amount of indebtedness of the company in a general way, shall also be posted up in like manner, and that the statement shall be corrected as often as any ma-

terial change takes place in relation to any part of the subject matter of such statement.

Section 8 relates to the manner of transferring shares.

Sections 9, 10 and 11 fix the liability of stockholders.

Section 12 provides that any corporation of the class specified in Section 1 of Title I, organized prior to the enactment of Title I, and which had been organized, or attempted to organize, under former general laws, may, on compliance with the provisions of Title I become a corporation thereunder.

Section 13 provides that:

> "Any corporation organized or re-organized under the provisions of this title, may obtain the *right of way*, over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites and grounds for depots, shops and other buildings requisite for the proper carrying on of the business to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices or other erection necessary for the convenient prosecution of their enterprise, all and any land damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property, and to canal in and along the valley of any such river, stream, lake or water course, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally creat-

ed by such improvement, by proceeding as in this title provided."

Section 14 provides that:

"They shall present to the judge of the district court in any county in which said improvements or any part thereof is or is to be located, or through which said railroad or telegraph line runs, or through which any river to be improved or canal to be constructed runs, or is to run, a petition signed by the president and secretary of said company or corporation setting forth a description of the enterprise to be prosecuted by them, the termini thereof, the counties through which the same is to be run, a general description of the land, property and real estate which it will be necessary to appropriate, take, use and overflow for the purposes of said enterprise, together with the names of the owners of any such property, if known."

Sections 15 to 23 provide for the appointment of commissioners to assess damages, and the procedure to be followed in proceedings before them.

Section 23 provides that the construction of such road, line, canal, or the prosecution of such improvement, shall not be hindered, delayed or prevented by the prosecutions of any appeal.

Sections 24, 25 and 26 provide for the appellate procedure in such cases.

Section 27 provides for the preservation of record-evidence of title to land acquired by condemnation proceedings had under the preceding sections.

Section 28 provides that, any telegraph corporation organized under Title I, shall have the power and right to use the public roads and highways

in this State, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or fixtures.

Section 29 provides that:

> "If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals."

Section 30 provides that, for the purpose of making preliminary surveys and examinations over and upon any contemplated route, such corporation, its agents, etc., may enter upon land, doing no unnecessary damage.

Section 31 provides that any corporation organized under Title I is authorized to obtain by purchase, gift or contract, all the rights of way, etc.

Section 32 provides as follows:

> "Whenever any railroad corporation, whether incorporated under this title or by a special charter, deems it necessary to extend its line of road across any navigable waters of this State, it has the power to construct such bridges as may be required for the purposes of said road across such navigable waters, and to repair and maintain the same in such man-

ner as may best subserve the interests of such corporations; *provided*, that such bridge shall not be constructed in a manner to obstruct or impede, in any wise, the free navigation of said waters."

Section 33 provides that:

"Every corporation organized under this title shall erect, at all points where their road crosses any public road, at a sufficient elevation from such public road to admit of a free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons of the necessity for the looking out for the cars; and any company neglecting or refusing to erect such signs, shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal; and each railroad company *shall fence its roads* with a good substantial fence, *under such rules as the county commissioners of the several counties through which the same may run, prescribe.*"

Section 34 provides that:

"Every railroad corporation organized under this title shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such corporation as a station for receiving passengers upon such trains, at least one minute; and also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods before each arrival at the crossing of any other railroad; and every corporation, and every person in the employment of such corporation that violates, or causes, or permits to be violated, the provisions of this section, is liable to a forfeiture * * * one half to go to the complainant and the remainder to the use of common schools in the county." * * *

Section 35 provides that:

> "Such corporation may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile, and for the transportation of property, not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said corporation or prescribed by law."

Section 36 provides that:

> "Whenever the lines of railroad of any railroad corporation whether organized under this title or by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads continuously without break or interruption, such corporations may consolidate themselves into a single corporation in the manner following." * * *

Sections 37 and 38 make further provisions for such consolidation.

Section 39 provides that:

> "Any railroad corporation heretofore or hereafter incorporated, whether under the provisions of this title or by special charter, may at any time, and by means of subscription to the capital of any other corporation, or otherwise, aid such corporation in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the corporations furnishing said aid."

Section 40 confers the power to borrow money.

Sections 41 and 42 prescribe the powers and du-

ties of such corporations as provided for the increase of capital stock.

Section 43 provides that:

> "Every railroad company incorporated under this title, shall annually, in the month of January, make a full report of the condition of its affairs, to the auditor of state, showing the amount of capital stock in such company, the gross amount of tolls or receipts during the previous year, the costs of repairs and incidental expenses, the net amount of profits and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such road; and the auditor of state shall annually present an abstract copy of such report to the legislature."

Section 44, being the last section of Title I, prohibits the declaring of dividends when the profits are insufficient to pay the same or the payment of dividends when the funds remaining will not meet the liabilities of the corporation and provides the penalty therefor.

If Section 1 of Title I, Chapter 34, Revision of 1866, stood *alone,* with nothing in its context to suggest any restriction upon the term used, it must still be held that it applied only to *steam railroads.* As before stated, there was nothing even in Chapters 11 and 13 of the Laws of 1887 which would suggest any limitation upon the term, and yet, in both cases above cited, the Supreme Court of the State of Minnesota held that the general term "railroad companies" and "railroad corporations" were to be construed as including only commercial steam railroads. But in the case at bar, when we come to look to the forty-four sections contained

in Title I, nearly all of them applying only to commercial steam railroads and not a single one, either specifically or by necessary implication referring to street railways, it is made absolutely certain that "railways" as used in that chapter means only commercial steam railroads.

When we look to the title which reads as follows: "Of corporations empowered to take private property for public uses," we see at a glance that nothing but commercial steam railways is intended by the term "railways" as used in that chapter. We shall discuss this point later on, but refer to it here merely in passing, inasmuch as there is no provision whatever in the Revision of 1866 with reference to the power of eminent domain, except what it contained in Title I, Chapter 34 itself.

At the time when this revision was enacted there were not only no street railways in the State of Minnesota, but, as a general proposition which holds good in nearly every State, a street railway company was not empowered to take private property for public use. In fact, as a matter of law, no corporation is empowered to take private property for a public use, except when and in the manner authorized by express statute.

It seems to us that the decisions of our own State have settled conclusively the proposition that the term "railway" as used in Title I, Chapter 34, Revision of 1866, does not include street railways, and does not include the complainant, and that the complainant could not be organized as a street railway under Title I, Chapter 34, unless it necessar-

ily falls under the term *"works of internal improvement, which require the taking of private property or any easement therein."* Nor, is the Supreme Court of Minnesota alone in so construing the term "railway."

It will be noticed that appellant's counsel in the *Funk* case (one of whom is now respondent's counsel in the case at bar) cite a large number of cases on pages 435 and 436 of the 61st Minnesota Reports, sustaining their proposition that the term "railroad" or "railway" includes only *commercial steam* railroads.

We shall refer to only a few cases in outside jurisdictions bearing upon the construction to be placed upon the term "railroad" and "railway."

In *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed. Rep. 82, it was held that the term "railroad corporation" as used in the Iowa statutes, did not include or apply to a street railway corporation. The statute provided in that instance that, "a judgment against any railway corporation for any injury to any person or property shall be a lien within the county where recovered on the property of such corporation and such a lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D., 1862."

Judge Shiras, who decided the case, said:

> "It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails down along the streets of a town or city, for the transportation of

> passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked and recognized distinction between street railway lines and those engaged in the general passenger and freight traffic of the country."

Citing on this point, the well considered opinion of Judge Caldwell in *Williams v. Railway Co.*, 41 Fed., 556.

Judge Shiras says that the point in dispute resolves itself into the question whether in the legislation of the State of Iowa, the terms "railroad or railway lines or corporations operating railroads or railways" should be held to include street railways, when the latter class is not specifically named. He calls attention to the fact that this section giving the lien forms a part of Chapter 5, McClain's Code of Iowa, which includes the legislation in regard to railways.

He says:

> "An examination of the 147 sections of this chapter shows that in none of them are street railways named, and at least 137 thereof show affirmatively, by the nature of the provisions thereof, that it was not the intent to include street railways therein, and it is therefore the fair inference that the entire chapter was intended to apply to the other class of railways. Thus in this chapter it is enacted that every corporation operating a railway shall, at all highway crossings, construct cattle guards, and erect signboards; must connect its line by means of a Y with all intersecting lines, and receive and draw the cars of all connecting lines; must stop not less than 200 feet from any other line of a railway intersected or crossed; and must give signals, by bell or

> whistle, beginning at least 60 rods from all highway crossings, of the approach of all trains. The application of these and similar provisions of this chapter would be practically a prohibition of the running of street cars. The chapter further provides for the assessment of railways by the state executive council; provides for the establishment of a board of railway commissioners, and declares its powers and duties; and it has never been claimed that these provisions extend to street railways."

All of the foregoing language applies with peculiar force to the provisions of Title I, Chapter 34, Revision 1866. There are similar provisions in this title which can by no possibility, be construed as referring to street railways without, as Judge Shiras said, a practical prohibition of the running of street cars.

The case of *Scars v. Marshalltown Street Railway Co.*, 65 Iowa, page 742, 23 N. W. Rep., page 150, well illustrates how strictly courts construe the general term "railway." The Iowa Code, Section 464, provided that cities "shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on streets, alleys and public places; but no *railway track* can be thus located and laid down until after the injury to property abutting upon the street, alley or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated." A street railway company under permission granted by the City of Marshalltown proceeded to lay its tracks

in a street in front of the plaintiff's property without compensation. He obtained from the lower court a temporary injunction against further laying of the track.

This order was reversed by the Supreme Court upon the ground that a "railway track" and "such railway track" as used in the section above quoted, referred only to *commercial steam railways.*

It was, of course, contended by the plaintiff that a railway track as used in the lower portion of the section referred to all tracks specified in the first part of the section. The Court, however, gave it the strictest construction and limited it to commercial steam railways.

In *Fidelity Loan & Trust Co. v. Douglass*, 73 N. W. Rep., page 1039 (Iowa), the Supreme Court of Iowa held that a "street railway company" was not a "railway corporation" within the meaning of Code 1873, Section 1309 declaring that a judgment against any railway corporation for an injury to any person or property should be a lien on the property of the corporation superior to that of any mortgage, etc.

The reasoning of the Supreme Court of Iowa is similar in all respects to that of the Circuit Court of Appeals in the case of *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed., 588. In discussing the question whether or not street railways should be included in the term "railway companies" or "railway corporations," the Court said:

> "But those sections must be construed in connection with the remaining ones of the chapter, and, when that is done, the most evident and satisfactory conclusion is that nothing contained in the chapter was designated to apply to street-railway corporations. *That conclusion is supported to some extent by the conceded fact that when the statute was enacted there were no street railways in this state, and therefore no occasion to legislate in regard to them.*"

This statement of the Supreme Court of Iowa is peculiarly applicable to the facts in the case at bar.

The Iowa Supreme Court quotes with approval the language of *Sutherland on Statutory Construction*, Section 241, as follows:

> "The application of particular provisions is not to be extended beyond the general scope of a statute, unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand, and it would not be a fair method of interpretation to apply their words to subjects not within their considerations, *and which, if thought of, would have been more particularly and carefully disposed of.*"

This statement of what seems to be a sound rule of construction, is of special significance in the case at bar when we consider the fact that, when the legislature of the State of Minnesota first dealt specifically with the power of eminent domain, so far as street railways are concerned, it granted such power of eminent domain to street railway companies only *outside of cities and villages.*

Again, in *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. Rep. 656 (Iowa) the Supreme Court of Iowa held that an "elevated railway" operated upon an elevated track in the streets of a city, although only for the conveyance of passengers taken from the street, is not a "street railway" so as to be excluded from liability for damages abutting owners under Section 464 of the Iowa Code.

After conceding that the purposes of the elevated railway were in all respects similar to those of a surface street railway, and that its business was local and confined to the carriage of passengers who entered the car at the street crossings in the usual manner, the Court still said that it was not the *kind* of a railway which the legislature had in mind when it excluded "street railways" from liability for damages to abutting owners. The Court said:

> "When this section of the Code was enacted, such a thing as an elevated railway transferring people from one part of a city to another was unknown. There is no reason to think that the legislature, in passing this section, had in mind such means of transportation. Indeed, under the circumstances, it must be presumed that the words 'street railway' as used in the statute, originally referred to the *then known* and used *railways*, the rails of which were laid to conform to the grade of the surface of the street, and the construction of which did not of necessity exclude the public from the use of a part of the street. While, as we have indicated, the object attained by an elevated railway like defendant's is the same as in case of a street railway laid upon the surface of the street, viz: the transportation of people from one place to another with-

> in the municipality, in every other respect the elevated road is distinguishable from a surface railway."

See also *Dieler v. Estill* (Ga.), 22 S. E. 622 as to the point that a general term will be given a restricted construction when other provisions in the same chapter point unmistakably to such restriction.

This view of the case is materially strengthened when we come to consider the fact that, the revision of 1878, Title I, of Chapter 34, contains in substance all of the provisions of Title I Chapter 34 of the Revision of 1866, and many other previsions, the number of sections in Title I, Chapter 34, Revision of 1866 being forty-four, while in Title I, Chapter 34, Revision of 1878 there are one hundred and eight sections.

In the latter revision, there are some provisions referring in specific terms, to water power companies and bridge companies. There are references to railways, railroad companies, narrow guage railroads, municipal bonds in aid of railroads, railroad mortgages, consolidation of railroads, etc.

As late as the revision of 1878, no reference whatever is made in Title I, Chapter 34, to street railways. Nor is there in the index to such revision, any reference to street railways. We have, therefore, no reference whatever in the Revision of 1866 to street railways as such, and twelve years later the Revision of 1878 was authorized, the number of sections was largely increased relating to railroads but Title I, Chapter 34 contains no reference

whatever to street railways nor does it contain any provisions specifically applicable thereto, while, like Title I, Chapter 34 of the Revision of 1866, it contains a great many provisions referring only to commercial steam railways and wholly inapplicable to street railways.

In the still later case of *Massachusetts Loan & Trust Co. v. Hamilton,* 88 Fed. Rep. page 588, the Circuit Court of Appeals, Ninth Circuit, held that a similar provision in the statutes of Montana (Section 707 Compiled Statutes of Montana, 1887) did not apply to *street railroads.*

After quoting the above section, the Court said:

> "Does this section apply to street railroads? Was it the intention of the legislature, at the time of the adoption of this section, that it should apply to all railroad corporations within the state,—to street railroads, as well as to commercial and steam railroads, operated by means of locomotives and cars, for the transportation of passengers and freight? Is there anything in the laws of Montana which sheds any light upon the question of the intent of the legislature? If not, how is the intent to be ascertained? What do the authorities say upon this subject?"

The Court then proceeds to analyze the statutes of Montana and calls attention to the fact that in May, 1873, the legislature passed "An act to provide for the formation of railroad corporations in the territory of Montana," Statutes of Montana, 1873, page 93.

The Court said:

> "The provisions of this act are general in their character, and are all specially appli-

> cable to steam railroads. At the time of the passage of this act there were no railroads of any kind within the territory. In 1887 the legislature of the territory passed 'An act in relation to railroads,' consisting of six sections, which, in the Compiled Statutes of Montana, is treated as a supplement to the railroad act of 1873, and numbered Sections 702 to 707; the last section, heretofore quoted, being the one under consideration. Sections 702 to and including 706 are specially applicable to steam and commercial railroads."

The Court also calls attention to the fact that, at the time of the passage of the act in question, there were no street railways in the Territory of Montana. But, at the same session, 1887, the legislature passed an act providing for municipalities authorizing the construction of street railroads.

The case of *Cedar Rapids & M. C. Ry. Co. v. City of Cedar Rapids, et al.*, 76 N. W. Rep., page 728 (Iowa), decided in 1898, illustrates how sharply the line is drawn between railways and street railways. Chapter 32, Acts 18th Gen. Assem. of Iowa authorized a street railway company, extending its lines beyond the limits of the city, to build and operate its road over and along any portion of a highway, of a width of a hundred feet or more.

For some time prior to 1895, the plaintiff company operated a street railway line between the City of Cedar Rapids and that of Marion. Later the line was equipped with a trolley system. The principal traffic was the carriage of passengers, although a little freight and some express were also carried. The plaintiff company had no passenger

depots or agents and operated throughout its entire length as a street railway generally is on city streets and country highways.

The question arose whether the property of the company should be assessed as that of other private property owners, or as the property of railroads by the executive council. The plaintiff company claimed that it was a railway company within the meaning of Section 1317, Code of 1873, which provided for the taxation of "all the property of each railway corporation in the state."

The Court said:

> "That plaintiff is a 'railway corporation' in the broadest signification of that term, may be conceded, but our inquiry is as to the sense in which those words are used in said section 1317. We need not quote the many provisions of the statute with respect to railroads which show that a distinction is recognized between what we may call 'commercial railroad corporations' and 'street railroad corporations.' That there is a distinction is not questioned, but the dispute is as to which class the plaintiff corporation belongs. The development of railways in and about towns and cities has brought the question before the courts whether the particular railway was a street or commercial railway, and the question has always been determined in the light of the statute and the facts of the particular case. The part of this road extending from Cedar Rapids to Marion was constructed and operated by the plaintiff corporation, under authority of Chapter 32, Acts 18th Gen. Assem. That act relates expressly to street railways and authorizes the extension of such street railways beyond the limits of the city or town, the location thereof along any portion of a highway which is of a width of 100 feet or more,

and the operation of the railway by either animal or motor power. *The fact that the line between Cedar Rapids and Marion was laid and operated along the highway as authorized by said act, relating exclusively to street railways, seems to us conclusive that the plaintiff is a street-railway corporation, and not a railway corporation, within the meaning of said section* 1317, *Code* 1873. *The fact that plaintiff's street railway was authorized to be extended and laid and operated along a highway precludes the conclusion that it was intended to be other than a street railway.*"

We pause here in quoting from this decision to call attention to the fact that the language here used is peculiarly applicable to the case at bar. The complainant here was organized as a *street railway.* It has constructed and operated nothing but a street railway. It has never pretended to comply with the general railway laws. It has always been taxed on its valuation and not on gross earnings.

The Court in the Cedar Rapids case calls attention to the fact that this line was organized as a street railway corporation, and was authorized to operate a street railway in the City of Cedar Rapids, and that under authority of Chapter 32, Acts 18th Gen. Assem., it extended its railway beyond the limits of said city. It was essentially in all respects a street railway, and the mere fact that it carried express and some freight did not take it out of the distinctive class in which its main and principal business placed it.

As a matter of fact, in the State of Minnesota, we had no general legislation upon the subject of street

railways until after the Revision of 1878, excepting what may possibly have been contained in the special charters to cities.

Referring to the *Montana* case, from 1887 on, the Montana Legislature enacted various provisions which obviously apply to both *steam* railroads and *street railways.*

The Court after referring to the term "railroad," and to its broad and restricted meaning said that, used in the former sense, it might include a street railway, and that used in its latter sense, it would necessarily exclude street railways. The question however, before the Court was, whether or not in the particular statute it included street railways. Whatever may be said in regard to the general rules of construction, the safest one to adopt, the Court said, was to look to all provisions of the statute in connection with which a term is used to ascertain its true meaning.

The Court observed that the words "railroad" and "railway" are to be treated as synonymous, and again that the general railroad act of Montana for the year 1873 only had reference to railroads of commerce, although it might be conceded that sections 1, 2 and 3 of the act were broad enough to include corporations for the construction and maintenance of street railways.

It was contended in the case just cited, that street railway corporation could be organized under the provisions of the general railroad act of 1873, but the Court said:

> "No question is here presented whether street railways can be incorporated under the provisions of the railroad act. The street railway company in this case was not organized under the general railroad act of Montana. It is a corporation organized and existing under and by virtue of the laws of the State of New Jersey."

(We refer to this statement by the Court for the reason that in a later case to which we shall call attention, the corporation in question was a street railway company organized under the laws of Montana.) The Circuit Court of Appeals said:

> "We are of opinion that this act, in all of its provisions, was intended by the legislature to apply only to the railroads of commerce. This conclusion is supported by a careful consideration of each of the six sections, and the evident object and purpose of all their provisions."

The Court proceeds to analyze the different sections pointing out that they are all clearly applicable only to steam railways and not to the ordinary street railway. It was conceded that the sixth section of this act standing alone might properly be held to apply to the property of a street railway company as well as to a steam railway company; but the Court held that the entire act must be considered, and, when so considered, street railways were to be excluded. The Court cites with approval, the case of *Funk v. St. Paul City Street Railway Co.*, 61 Minn. to which we have already called attention; and it also cites with approval the case of *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed., above cited.

A similar question was raised in the case of *Central Trust Co. v. Warren*, before the same Court, reported in 121 Fed. page 323. A writ of certiorari was denied in this case by this Court. (See 191 U. S. 568).

This case was presented upon the additional point that the Helena Power & Light Co., which operated the street railway, was organized under the *general railroad act*. In that act the words "street railways" were not used; only the general term "railroads." The Court held that it had no power to insert "street railway" into the section.

In view of the fact that all of the other provisions of the act refer so unmistakably to commercial steam railways, the Court held that the Helena Power & Light Co. was not incorporated under the general railroad act, and that consequently the case could not be distinguished from *Massachusetts Loan & Trust Co. v. Hamilton*, 88 Fed. Rep. 588, above cited.

The point was also made that if the company could not be organized under the *general railroad act*, it could not be organized at all under the laws of Montana.

There was, besides the general railroad incorporation act above referred to, a general act providing for the organization of "corporations for industrial or productive purposes," corresponding very closely to the provisions of Title II, Chapter 34, Revision of 1866.

Section 446 reads as follows:

> "At any time hereafter three or more persons who may desire to form a company for the

purpose of carrying on any kind of manufacturing, mining, mechanical or chemical business; or digging ditches, of building flume or running tunnels, of purchasing, holding, developing, improving, using, leasing, selling, conveying or otherwise disposing of water powers and the sites thereof, and lands necessary or useful therefor, or for the industries and habitations arising or growing up, or to arise or grow up, in connection with or about the same; of purchasing, holding, laying out, platting, developing, leasing, selling, dealing in, conveying or otherwise using or disposing of townsites, or towns, or the lots, blocks, or subdivisions thereof, or lots, blocks, or subdivisions in any town, village, or city, or of carrying on any other branch of business designed to aid in the industrial or productive interests of the country and the development thereof, or of one or more of the aforesaid branches of business, may make, sign and acknowledge before some officer competent to take acknowledgements of deeds, and file in the office of the clerk of the county in which the business of the company shall be carried on, and a duplicate thereof in the office of the secretary of the territory, a certificate in writing," etc.

The Court, after citing a number of cases upon the point as to what kind of corporations could be organized under the general term "industrial pursuits" held that a street railway if not properly organized under that head, could, in any event, be organized as a corporation to carry on "any branch of business designed to aid in the productive interests of the country and the development thereof."

This holding of the Circuit Court of Appeals, would seem to dispose of the contention of the Lower Court in the case at bar, that, if the complainant

could not have been organized under Title I, it could not have been organized at all.

The language of Title II, Chapter 34, Revision of 1866, is as follows:

> "Any number of persons not less than three, who shall, by articles of agreement in writing, associate according to the provisions of this title, under any name assumed by them for the purpose of engaging in and carrying on mining, smelting, or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical or chemical business, and who shall comply with the provisions of this title, shall, with their successors and assigns constitute a body politic and corporate, under the name assumed by them in their articles of association; provided, no company shall take a name previously assumed by any other company."

Before this complainant was organized, this act had been twice amended. First, by Chapter 23, General Laws of Minnesota, for 1868, this was amended so as to include "*insurance* or *transportation business.*"

Second, by Chapter 13, General Laws of Minnesota for 1873, the phraseology of the section was changed so as to read as follows:

> "Any number of persons, not less than three, who have or shall, by articles of agreement in writing, associate according to the provisions of this title under any name assumed by them for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing iron, copper or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate or other mineral substance, *or for constructing, leasing or operating docks, ware-*

> *houses, elevators or hotels, or as a mutual savings fund, loan or building association, manufacturing gas*, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, *transportation* or *other lawful business*, and who have or shall comply with the provisions of this title, shall with their associates, successors and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement."

This act was approved March 10, 1873.

This section, as amended in 1873, we think, is a complete answer to the argument contained in the decision of the Lower Court to the effect that Title II, Chapter 34, Revision of 1866, did not authorize the organization of any *quasi public* corporation.

The learned judge of the Lower Court, said, (See pages 126, 127 of the Transcript of Record):

> "Now, this is a corporation which evidently is not formed for the purpose of *private gain*. It is not a *private* business. It is a *quasi* public corporation, a corporation formed for the performance of public service wholly. Its entire business is the carriage of passengers for hire, and it is obliged to carry everyone who offers himself to be carried. Its duties are public. It is a corporation of the character that is ordinarily empowered to exercise the right of eminent domain, which is one of the highest powers of the sovereignty, the power to take private property for a public use; therefore, a corporation can only exercise that power when the right to exercise it is delegated by the sovereign, and then only for a public use. It is only where the corporation is a public service corporation, a quasi public corporation, that it can be authorized by the legislature, by the sovereign, or invested with the

exercise of that power. Now, there is no such corporation, no such business as that, included in title 2 of chapter 34, of the general statutes of 1866, *and I feel, therefore, compelled to hold that this corporation could not have been formed under that title for it is not at all of the character of the businesses that are named for which corporations may be formed;* and even although that title might be extended to kinds of business that are not particularly named, they would have to be corporations of a similar character in order to come under it. *This is not of similar character to come under it, and therefore if it was not a corporation formed under title I, its business was not such as would allow its promotors to form a corporation under title two and they would have no authority under the statutes of* 1866 *to form a corporation at all."*

It will be noticed that the attention of the lower court had been previously called to the amendments, to-wit, Chapter 23, General Laws of Minnesota for 1868, which was approved March 4, 1868, and which added the words to Section 45, Title II, "insurance or transportation business," and Chapter 13 of the General Laws of 1873.

It will also be noticed that Title II has as a heading, "Of corporations for pecuniary profit other than those named in Title I."

It seems to us that the word "transportation" specifically covers the organization of a street railway corporation. We can scarcely imagine any word of general signification which would do it more effectually. But the most complete answer to the argument contained in the decision of the Lower Court is found in the language of the amend-

ment of 1873. Among the kinds of business, for the carrying on of which corporations may be organized, there is specifically included corporations for the *constructing, leasing,* or *operating docks, warehouses, elevators* or *hotels.* These are all charged with the duty of serving the public, and are, and always have been, considered as *quasi public* corporations, while mutual savings fund, loan or building associations, though not strictly public service corporations, are *quasi public* in their nature, and have always been subjected to the strictest legislative supervision.

It will also be noticed that manufacturing gas is specifically mentioned. We have here one of the most common forms of *public service corporations;* and then we come to the words "transportation or other lawful business." The statement, therefore, of the Lower Court, unless applied simply to the Revision of 1866, ignoring entirely the amendments of 1868 and 1873, is entirely inaccurate.

This is so obvious that we hardly deem it necessary to pursue the subject further. We wish, however, to call the Court's attention to a few cases bearing directly upon the point that, under the provisions of a law like Title II, Chapter 34, Revision 1866, corporations for almost any kind of business might be organized.

It will be noticed that the language of the heading to Title I is restrictive, to-wit: "Of corporations empowered to take private property for public uses." That title and all the provisions under it are necessarily to be strictly construed.

When we come to consider the language of Title II, which is headed, "Of corporations for pecuniary profit other than those named in Title I," the same must be *liberally* construed. In other words, only such corporations can be organized under Title I as are either specifically mentioned or necessarily included in the general terms used. The language of the title and of all the provisions is necessarily *exclusive*, while Title II *includes* everything not *covered* by Title I.

In *Wells, Fargo & Co. v. Northern Pacific Railroad Co.*, 23 Fed., 469, it was held that an express company was properly organized under a statute including corporations for industrial pursuits. In that case, there was nothing in the classes of business for which corporations could be organized at all similar to the express business, but the Statute used the broad language, "for any industrial pursuit;" and the Court held that it was not to be limited by the classes enumerated, but to be broadly construed so as to include "any lawful business" which might come under the head of industrial pursuit.

Decisions to the same effect from many jurisdictions might be cited, but we deem it sufficient to call the Court's attention to the case of *Brown v. Corbin, et al.*, 40 Minn., 508.

This case was decided in 1889, and deals specifically with General Statutes 1866, Chapter 34, Section 45, as amended by the Laws of 1873, Chapter 13, being Title II.

Judge Mitchell said:

> "As originally enacted, this statute authorized the formation of corporations for various kinds of business specifically enumerated. To these others were added by an amendment in 1868, and still others in 1869. Finally, in March, 1873, it was again amended so as to include a variety of still other kinds of business specifically enumerated, and then adding the general words 'or other lawful business.' Defendants invoke the rule that when particular words are followed by general ones, the general words are restricted in meaning to objects of the kind particularly enumerated, and therefore that the phrase 'or other lawful business' must be limited to a business of the same kind as those previously enumerated. We think the rule invoked is not applicable, at least in the narrow and restricted sense in which defendant seeks to apply it. The kinds of business specifically enumerated bear no common analogy to each other except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by *quasi public* corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

The particular corporation involved in this case was, the Detroit Townsite & Land Company. It was organized for the purpose of doing the kind of business which its name implies.

The first point raised was, that there was no authority at the time of the organization of the company for the formation of corporations to carry on

the business specified in its articles. This point was squarely overruled by the Supreme Court of Minnesota, holding that "other lawful business" would clearly include the business named in the articles.

In *Gould v. Fuller, et al*, 79 Minn., page 414, the Supreme Court of Minnesota said:

> "The powers of a corporation, and the purposes for which it is organized, must be determined by the articles of incorporation; and it can exercise no power other than those therein specified, and such as may be incidental thereto."

The case of *Thompson & Houston v. Simon*, 20 Ore. 60, (25 Pac. 147) is an instructive case upon the distinction between street railways and railways and also upon the further point that street railways do not require the taking of private property and are not authorized under the statutes of Oregon to exercise the power of eminent domain.

It was contended squarely in that case that the statutes of Oregon authorized condemnation of private property for a right-of-way by street and suburban railways as well as by commercial steam railroads. It was urged that Section 3239, Hill's Code, which provides that a corporation organized for the construction of "*any railway*" might appropriate land for a right-of-way, necessarily included in the term "any railway," street and suburban railway corporations.

On the other hand, it was contended that "railway corporation" and "any railway" were to be

restricted to the ordinary commercial steam railways, and that the extraordinary power of eminent domain was not to be granted except in express terms or by necessary implication.

Section 3254 of Hill's Code is very similar in terms to Section 13 of Title I of Chapter 34, Revision of 1866.

The Court held that it was not necessary for a railway company to be authorized to or actually engage in the carriage of freight in order to make it a common carrier, and that a corporation might be a common carrier although it carried only passengers, or, on the other hand, only freight. The question at issue was determined upon broader and safer grounds. It was held that whether "any railway" should include "street railways" must be determined by the context and by the evident intent of the legislature.

It was commented upon by the Court that, corporations operating street railway lines are classed, in common parlance, as *"street railways."* The Court said that this was a matter of common knowledge of which it must take notice, and that a company operating by electricity or other power ordinary street cars, running them upon rails laid on the surface of the streets in aid of ordinary street traffic, must be held to be street railways pure and simple.

The statutes of Oregon, Section 3234, Hill's Code, provide that *"a corporation organized for the construction of any railway may appropriate so much of said land as may be necessary for the line*

of such road, etc., and besides a sufficient quantity for workshops, etc." There are several other provisions, indicating, as in the case of our own statutes, that only a commercial steam railroad was in contemplation. The Court said:

> "Few, if any of these provisions have any reference to the class of corporations to which the pliantiff belongs, and was scarcely intended to apply to them. They contemplate and authorize a railway to be constructed where none was built before, through the country, requiring bridges, cuttings, fillings, and embankments, and sometimes tunnels, through hills and mountains, and, also, the building of depots and stations for the accommodation of freight and passengers, of engine-houses, repair-shops, switches, and turnouts to enable the corporation to properly conduct its business."

It will be noticed that many provisions of Title I, Chapter 34, Revision of 1866, provide for precisely the same things.

The Court further observes that the provisions referred to can have little or no reference to street railways intended to accommodate local convenience for the transportation of passengers.

It said:

> "They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel."

Then follows a statement which seems a complete answer to the reasoning of the learned Judge of the Lower Court in the case at bar:

> "*It is not enough that a railway is for a public use to authorize the taking of private property, but the taking must be for a public use within the scope of its undertaking, and the object which it is to subserve.* To authorize railroads operated for such purposes to take the private property of the citizen, and appropriate it to its use without his consent, the statutory authority for it must be plainly given; otherwise, the right does not exist. In view of these considerations, we do not think the provisions of the statute for the condemnation of a right of way apply to the plaintiff, so as to authorize it to take private property without the consent of the owner for its own use as a right of way."

There was a further opinion filed in this case upon rehearing, December 1, 1890, which appears in connection with the original opinion. The discussion, however, is along the lines of the original opinion, and the result first announced is adhered to.

The headings to Title I and Title II, of the Revision of 1866, are preserved in Title I and Title II of Chapter 34 of the Statutes of Minnesota, 1878. In the latter compilation, the heading to Title I is, "Of corporations empowered to take private property for public uses." And of Title II, the heading is, "Of corporations for pecuniary profit other than those named in Title I."

It seems to have been in the mind of the Lower Court that a *quasi public* corporation *must neces-*

sarily be empowered to take private property for a public use. This, of course, is obviously incorrect.

The Lower Court recognizes the fact (See page 127 of the Transcript of Record) that no corporation can exercise the power of eminent domain, unless such power has been delegated to it by the sovereign, and then only for public use. The learned Judge of the Court below says:

> "Now, there is no such corporation, no such business as that, included in Title 2 of Chapter 34, of the Generals Statutes of 1866, *and I feel, therefore, compelled to hold that this corporation could not have been formed under that title for it is not at all of the character of the businesses that are named for which corporations may be formed.*"

Corporations for the purpose of operating docks, warehouses and elevators are clearly *quasi public* corporations, and they may, undoubtedly, be empowered by the State to take private property for such purposes where the use to which the property is to be put is necessarily of a public nature and for the benefit of the public.

The learned Judge of the Lower Court must have overlooked the words referring to *gas companies* contained in the amendment of 1873. It is a matter of common knowledge that gas, electric light and water companies are among the most familiar corporations invested by the various statutes with the power of eminent domain.

No one would contend for a moment that a corporation organized for the purpose of operating docks, warehouses, elevators or hotels or for sup-

plying gas or electric light or water would have any common law right or constitutional right to exercise the power of eminent domain. That power is inherent in sovereignty. It can only be exercised by the subject when such power has been expressly delegated by the sovereign.

There is no such thing known to the law as a corporation having inherently the right to exercise the power of eminent domain. It has that power if the legislature has, in fact, delegated it to it, but not otherwise.

And again the learned Judge of the Lower Court says, "that even although that title (Title II, Chapter 34, Revision 1866) might be extended to kinds of business that are not particularly named, they would have to be corporations of a similar character in order to come under it."

This statement of the learned Judge is in direct conflict with the decision in the case of *Brown v. Corbin,* 40 Minn., 508. There, Mr. Justice Mitchell, speaking for the Court said, on page 510:

> "Evidently the expression 'or other lawful business' was added as a sort of catch-all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

It seems perfectly apparent to us that, when it is considered that Title I is, by its heading and by the enumeration contained in Section 1, as well as by all its provisions *restrictive,* while the heading of Title II and the enumeration contained in Section 45 and the language of the other provisions

are *comprehensive* and *inclusive*, the complainant could well be organized under Title II, while it clearly could not be organized under Title I.

It will be noticed that nowhere in the decision of the Lower Court is any reference made in direct terms to the amendment of 1868 which added the words "*insurance and transportation business.*"

It seems to us impossible to say that a street railway company might not properly be organized under the term "transportation." It is transportation in the most simple and common sense. In fact, it is a business which has for its main, and we we may add only, purpose, transportation. It certainly will not admit of doubt that transportation means, transporting, conveying or removing freight or passengers from one place to another. It seems like an oversight on the part of the learned Judge of the Lower Court to assert that there was no specific enumeration in Title II of Chapter 34 of a kind of business which would include *street railways.*

It is a matter of the utmost significance that from territorial times, with hundreds of special and general acts passed by both the Territorial and State Legislatures, no reference in all the legislation, from the earliest times down to the year 1893, was made to street railways. In 1893, there were street railways in Minneapolis, St. Paul and Duluth. Those railways were all operating under franchises or permits granted by the respective municipalities.

The St. Paul Street Railway Company was organized under a special charter from the State.

The Duluth Railway Company was organized under general law and afterwards its charter was confirmed, with additional privileges granted by a special act.

In 1893, the legislature passed "An act to compel street railway companies to protect certain of their employes from the inclemency of the weather." (See Chap. 63, Laws 1893). It will be noticed that this act was made to apply specifically to street railways.

No reference was made to street railways in the legislation of 1895 or 1897; but in 1899, by Chapter 350, Laws of 1899, "*An act providing for condemnation of right-of-way by street railway companies in certain cases*" was enacted. It reads as follows:

> "Section 1. Any corporation organized under the laws of this state, for the purpose of constructing a street railway in this state, wholly or partly without the limits of any city or cities, shall have the right to acquire and occupy private right of way throughout any portion of its route *outside the limits of any city or cities*, whenever deemed necessary by such corporation, and for that purpose shall have the power to exercise the right of eminent domain, including the crossing of intervening highways when necessary, and the provisions of sections twenty-six hundred and five (2605) to twenty-six hundred and sixteen (2616), both inclusive, and section twenty-six hundred and forty-two (2642), Statutes of Minnesota, eighteen hundred and ninety-four (1894), so far as consistent herewith,

shall apply to and govern the exercise of such right."

It will be noticed that by this act there is granted to street railway companies organized under the laws of this State, which may be operating a line wholly or partly *without* the limits of any city or cities, the right to exercise the power of eminent domain *only outside such limits.* It also provides that certain general sections of the statutes as to the manner and method of exercising the right, so far as consistent, may be made applicable.

If the complainant's contention is correct, to-wit, that it was organized under Title I, Chapter 34, Revision 1866, and that it then had, and always has had, the right to exercise the power of eminent domain, this is one of the most inexplicable statutes.

Street railway corporations, *as claimed by the complainant and as held by the Lower Court,* have always had the power of eminent domain, not only *without* the cities but *within* the cities. In other words, it is claimed that the complainant has always had as broad and as general a right to exercise the power of eminent domain as railroads. Yet, here, twenty-three years after the revision of 1866, without any previous legislation on the subject, the Legislature of the State undertakes to confer upon street railway corporations, *the limited right to exercise the power of eminent domain* OUTSIDE OF CITIES ONLY.

It is safe to say that lawyers generally have always understood that street railway companies could not be organized under Title I, Chapter 34,

Revision of 1866, and that they have never had the right to exercise the power of eminent domain, either inside or outside of cities until this act of 1899 was passed; *and that since that time they have had only the limited right to exercise that power outside of cities.*

We have then this anomalous situation: If the contention of the complainant is correct, street railways, many years before they were constructed in the State of Minnesota, were allowed to organize under Title I, Chapter 34, Revision of 1866, and by the provisions of that title were empowered to exercise the power of eminent domain. That power was given to them in as broad terms as it was given to railroads. That power this complainant has always enjoyed. In other words, it could condemn property for its right-of-way, shops, offices, sheds, turntables, etc., either *within the city limits* or *without.*

It is a matter of common knowledge that as street railways came into use in at least three cities of the State, there was felt the necessity of giving such street railways the right to exercise the power of eminent domain *outside of city limits,* a power which no one at that time ever claimed street railways had, either within or without the city limits.

It will be noticed that, in 1899, for the purpose of enabling street railway companies to build suburban lines, "An act empowering Boards of County Commissioners to authorize for a term of years the construction and operation of street railway

lines upon the highways of their respective counties outside of cities and villages" was passed. This is Chapter 305, of the Laws of 1899.

It will also be noticed that this act was approved on the same day that Chapter 350 of the same year was approved. The purpose and object of these two acts are perfectly apparent. But, as before stated, it is inconceivable that any necessity for these acts should have been felt if, as contended for by the complainant, street railway companies were invested with the full power of eminent domain.

In 1901, there was no legislation with reference to street railways. Although there were several provisions enacted which relate to *"any railroad corporation* or to *any railroads."* Each of these acts, however, are obviously intended to apply to steam commercial railroads. These acts relate to tax on gross earnings, extensions of lines and the building of branches, free transportation to employes and to depots, waiting rooms and freight houses.

In the special session of 1902, there is no legislation as to street railways, nor any legislation under the head of "Railroads," which could apply to street railways.

In 1903, there were half a dozen or more acts relating to railroads, but all of these acts obviously apply only to commercial steam railroads. They relate to the loading of cars on sidetracks, and to larceny of grain from cars, the use of velocipedes and tricycles on the tracks of railroads, to consolidation of railroads, to the removal of stations and

depots, to switches and branch lines, gross earnings and to shipment of animals, birds and fish, and to the hours of employment of engineers and firemen.

There is one act in the Laws of 1903 relating specifically to street railways as such. (Chap. 139, page 196). This act is entitled, "An act empowering village councils in villages of less than three thousand to grant authority for the construction of street railway lines for the purpose of connecting villages with surrounding territory and legalizing and confirming such authority heretofore granted by such village councils."

It is worthy of note that in this act the legislature recognizes the fact that railways in cities and villages running upon the streets are *"commonly known as street railway lines,"* so referring to such lines in Section 1 of that act.

Chapter 250, Laws of 1905, is entitled "An act empowering city councils in cities now or hereafter having a population of not less than ten thousand and not more than twenty thousand, to grant authority for the construction of street railway lines in such cities and for the purpose of connecting said cities with surrounding territory and other cities and villages, and legalizing and confirming such authority heretofore granted by such city councils." This act refers to *street railway lines* operated by other power than steam.

In 1905, there was adopted a revision of the statutes. This revision was made by a commission consisting of three lawyers. At the time of the revision, there was in use a compilation of the Stat-

utes of Minnesota, 1894, consisting of two very bulky volumes. The principal purpose of the revision was to cut down and thoroughly revise the laws of the State. This commission occupied about three years' time in this work, the result being the Revised Laws of Minnesota, 1905, consisting of one volume.

The statutes, with reference to corporations of all kinds, were most carefully pruned. The bulk of such statutes had become enormous and quite inconsistent and ambiguous.

The chapter relating to corporations is now known as Chapter 58 of the Revised Laws of Minnesota, 1905. A comparison of this chapter with the previous chapter 34, Compilation of 1894, will show how complete the revision, consolidation and condensation has been. The new chapter has seventy-three pages, and these pages include the organization, powers and rights of every kind of corporation known to the laws of Minnesota; while Chapter 34 of the Compilation of 1894 has two hundred and twenty-one pages relating to the same subjects.

The different titles contained in the previous chapter 34 relating to corporations, are wholly abandoned.

For the first time in the history of the State, street railways are specifically mentioned in connection with the formation of corporations. It will be noticed, however, that there was added to Section 2841, relating to the organization of various corporations, including street railways, a provision prohibiting the erection, maintenance or operation

of any railway of any kind upon any street, alley or other public ground without obtaining from the city a franchise so to do.

The most significant fact in connection with that revision, however, is, that by Section 2842, which confers the right of eminent domain upon corporations organized for the purposes specifically mentioned in Section 2841, it is specifically provided *"that no street railway company shall have or exercise such right within the limits of any city or village."*

It was rather perfunctorily claimed at the argument in the Lower Court by the complainant that this revision of 1905 recognized, as existing in street railway companies, the right to exercise the power of eminent domain. It seems clear to us that it recognizes simply the qualified right to exercise the power of eminent domain which had been given by Chapter 350 of the Laws of 1899; and that was simply the right to exercise the power of eminent domain *outside* of cities or villages.

No one can read, in its proper order, the legislation upon this subject without being inevitably brought to this conclusion.

By Section 2856 of the Revision of 1905, it will be noticed that a railroad corporation may be formed for any period specified in its certificate of incorporation, while all other corporations may be organized for a period not exceeding *thirty* years.

Continuing on after the Revision of 1905, we see the same line of demarcation running through gen-

eral legislation relating to *railroads* and *street* railways.

There are a dozen or more general provisions which relate only to commercial steam railways, while there is only one act which relates to street railways. This is Chapter 452, Laws of 1907, relating to public utilities and the purchase or acquirement thereof by cities.

Again, in 1909, we find the legislature passing ten or more acts unmistakably relating to commercial railroad companies. All of these acts are indexed under the head of "Railroad Companies"; while one act, which relates specifically to street railways, is indexed under that head. It is chapter 482 of the Laws of 1909. It is entitled, "An act authorizing railroad and street railway companies to enter into contracts so as to enable railroads and street railways to be operated in connection with each other."

Here again is a most significant construction placed by the Legislature of 1909 upon the words "railroad" and "street railway" or "street railroad." Here is an act unmistakably referring to commercial street railways on the one side and ordinary street railways on the other side.

In the title to the act, the Legislatue uses the word "railroad" where it undoubtedly refers to commercial steam railroads, and the term "street railway" where it is referring to strictly street railway companies.

Section 1 of this act makes it perfectly plain what was in the mind of the legislature when it

was dealing with these two terms, "railroad" and "street railroad." In the first place, the language of Section 1 is, "any railroad or railway corporation," showing that the words "railroad" and "railway" are used synonymously; and, secondly, that railroad or railway corporation is used only with reference to commercial steam railroads.

The two terms "railroads" and "street railways" are used in contradistinction throughout this act. This use by the legislature in 1909 of these terms, "railroad," "railways" and "street railways" is strictly in accord with the construction which has been placed upon them by every Legislature from territorial times down to the present. It is strictly in accord with the construction placed upon these terms by the courts of this State as previously shown.

Between 1866 and 1893, there are hundreds of railroad acts, both general and special, passed by the Legislatures of this State; and none of these acts refer specifically to street railways, and none of them can be fairly construed as applying thereto.

It will be noticed that when the first act specifically referring to street railways was passed by the Legislature of Minnesota in 1893 (See Chap. 63, Laws of 1893), it was preceded by Chapters 59, 60, 61 and 62, all relating to railroad companies, railroad corporations, railway companies and railways. Every one of these acts immediately preceding Chapter 63 obviously refer to commercial railroads, showing how plainly the legislature was distin-

guishing between *railroads* and *railroad companies* on the one hand and *street railways* and *street railway companies* on the other.

We conclude this part of our brief with the statement that it amounts to a demonstration that street railways could not be organized under Title I, Chapter 34, Revision of 1866 as railroads; and that they could be organized under Title II, Chapter 34, Revision of 1866 as amended in 1868 and in 1873.

But conceding this to be true, the complainant still contends that it was properly organized under Title I, Chapter 34, Revision of 1866 as amended, for the reason that it is not a *street railway strictly speaking* but *that it is more than that,* and, *in fact, a railway.*

In the original Bill of Complaint it was alleged, *"that complainant was organized for the purpose and with the power of owning and operating street railways within said City of Minneapolis. That it now owns and operates various lines of street railway hereinafter in this bill more particularly set forth."*

That, as we think, correctly states the purposes and the power of this complainant corporation. After, however, the point was raised against the complainant that it could not be organized under Title I, Chapter 34, Revision 1866, it filed the Amended Bill of Complaint as the same now appears in the Transcript of Record.

It then alleged, "Complainant was organized for the purpose and with the power, among other things, of owning and operating street railway lines

within said City of Minneapolis, *and the building, owning and operating of railroads within Hennepin County, Minnesota.* That it now owns and operates various lines of street railway hereinafter in this Bill more particularly set forth.

The italicized words will show what the complainant has added by this amendment.

It now contends that it is, in effect, a railroad. But it has been authoritatively settled by the decisions of the State of Minnesota, that the status of a corporation is to be determined not by what it labels itself, but by the general nature of its business as declared in its articles of incorporation.

In this case, the complainant states by its articles of incorporation (See exhibit A, page 32, Transcript of Record) that the general nature of its business is "to construct and operate railways in the street (s) and highways of the City of Minneapolis and its suburbs in the County of Hennepin, State of Minnesota, and the principal place of transacting the said business is the said City of Minneapolis."

It will be noticed at a glance how the complainant is construing this language of its first article of incorporation. We do not hesitate to say that the only true and sensible interpretation and construction of that article is, that the business of this corporation is *"to construct and operate railways in the streets and highways of the City of Minneapolis and of its suburbs in the County of Hennepin."* There is not a single suggestion in the articles of any purpose or idea of constructing and operating

"railroads" in the County of Hennepin.

According to the interpretation of article 1 of complainant's articles of incorporation placed thereon by its counsel, the complainant would have the right to construct street railway lines within the City of Minneapolis, and also the right to build and operate commercial steam railroads anywhere within the County of Hennepin, *including* the City of Minneapolis. *This, it clearly seems to us, is a palpable distortion of the language of article* 1.

It appears by the allegations of the complainant's Amended Bill of Complaint that, "it now owns and operates various lines of street railway, hereinafter in this Bill more particularly set forth." It is nowhere claimed that this complainant has ever built or claimed the right to build, any commercial steam railway, either within the City of Minneapolis or within the County of Hennepin outside of the city limits.

The *name* of the company is itself suggestive of the nature of its business, to-wit, *Minneapous Street Railway Company.* Counsel for respondent would make it appear that this company is to construct and operate railways in the streets and highways of the City of Minneapolis and (disregarding streets and highways in the suburbs) to build a railroad or railroads anywhere in the County of Hennepin. This, we think, is obviously an absurd construction of the first article of incorporation.

The decision of the Supreme Court of Minnesota, in the case of *Minneapolis & St. Paul Suburban Railway Company v. Manitou Forest Syndicate,*

101 Minnesota Reports, 132, is, we think, conclusive against the complainant's contention here that it is not a street railway pure and simple, and that even if it is, it could be organized under Title I, Chapter 34, Revision of 1866, and that it *always has had the right to exercise the power of eminent domain.*

The Minneapolis & St. Paul Suburban Railway Company is a corporation allied with this complainant and operates in connection with it. It was represented by the same counsel who now represent complainant. It sought to exercise the right of eminent domain by condemning a right-of-way at a railroad crossing and over certain private property outside of the streets and highways of villages in Hennepin County. It was incorporated in 1899 and in its articles of incorporation it was stated that it was organized under Title II, Chapter 34, Statutes of Minnesota 1894.

The defendant in that case contended that, being a corporation organized under Title II of said Chapter 34, it was not invested with the power of eminent domain, and this was practically conceded by the plaintiff's counsel. It contended, however, that the real nature of the corporation was not to be determined by its label, to-wit, that it was organized under Title II, but solely by its declared purposes and objects, to-wit, "the general nature of said corporation shall be to purchase, lease, build, own and operate suburban street railways, extending from the city limits of the Cities of St. Paul and Minneapolis to and into outlying cities, towns

and villages, within the State of Minnesota, the following being among the lines of street railway which this corporation shall have the right to either build or acquire by purchase or lease, and to own, operate and maintain after such building or acquisition" (See pages 142 and 143 of the opinion).

Following this declaration as to the general nature of the business, is a description of the lines which the company proposes to build. "One, from the easterly limits of the City of St. Paul, through the village of North St. Paul to Wildwood, on White Bear Lake, and thence from Wildwood to the City of Stillwater and the village of South Stillwater; another line, beginning at the southerly limits of the city of St. Paul, and extending thence in a general southeasterly direction to the city of South St. Paul; another line beginning at Camden Place in the City of Minneapolis and thence in a general northwesterly direction to the City of Anoka; and another line, which is the one involved in this proceeding, extending from the westerly limits of the city of Minneapolis, at or near the point where the Lake Harriet street railway line, if extended, would intersect the western city limits of the city of Minneapolis, and running in a westerly direction, along such route as shall be determined upon by the company, to the village of Hopkins, along and upon such route as shall be designated and determined upon, to Lake Minnetonka, and to such point on the lake as may be determined upon by the company."

It was further stated that the company was incorporated

> "To lease, purchase or build, own and operate such other line or lines of surburban street railway within the State of Minnesota as the board of directors of said company may determine upon hereafter. Also to lease, purchase, build, own and operate, by either electric or steam power, such steamboats, launches, or other boats as may be determined upon by said company, upon White Bear Lake, Lake Minnetonka, and such other lakes within the State of Minnesota as may be determined upon by the company. Also to lease, buy and own all real estate necessary for or incidentally connected with the building and operation of the street railway lines and the business herein provided for. Also to purchase and own stock or stocks of suburban or other street railway companies, and to purchase or lease railway lines within the state of Minnesota. Also to lease, construct, own and operate electric or other power stations, electric lighting plants or stations, and in connection therewith to construct, maintain and operate electric lighting plants, and to furnish electric light or power to either persons, corporations, cities, towns or villages; and, generally, to do any and all things necessarily connected with or incidental to the business herein authorized and provided for."

The first point decided was, that it "is not controlling that the incorporators declared they proposed to incorporate under Title II, if in fact they did comply with and are incorporated under the provisions of Title I." Citing, *International Boom Co. v. Rainy Lake River Boom Corporation*, 97 Minn. 513; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

The Court said:

> "Although the articles state that it is the purpose of the company to purchase, lease, own and operate street railways, the word 'street' is not significant, because the context shows that the articles do not refer to that class of railways. The railways described in the articles are suburban railways, extending from the city limits of St. Paul and Minneapolis to and into outlying cities, towns and villages within the state of Minnesota, viz.: From St. Paul to North St. Paul, White Bear, and Stillwater; from St. Paul to South St. Paul; from Minneapolis to Anoka, and from Minneapolis to Lake Minnetonka."

It will be noticed that the articles of incorporation strictly confine the business of the corporation to what the Court calls *"suburban lines."* The Court said:

> "The proposed railways are to run from the limits of the cities to distant cities and villages, *through land where there are no streets; and hence the word 'street'* was not used in the articles for the purpose of limiting the corporation to the provisions of Title II."

Here the Supreme Court of Minnesota recognizes that street railway companies, as such, are properly organized under Title II.

That a corporation is conclusively determined by its articles to belong to one class or another, as defined by the statutes, is shown by the case of *International Boom Co. v. Rainy Lake River Boom Corporation,* 97 Minn. 513.

This was an action of replevin brought by the plaintiff against the defendant for wrongfully and unlawfully detaining about one million feet of logs.

The defendant company justified its possession of the logs under the provisions of Chapter 221, page 350, Laws of 1889. This act was in express terms, an amendment of *Title I, Chapter 34, Compilation of 1878.*

There was added to the provisions of Title I by this amendment, a provision giving a lien to any corporation formed under that title for the improvement of any stream and driving logs therein or for holding or handling logs therein.

Defendant was organized, as expressed in its articles of association, under Title II, Chapter 34, General Statutes of 1894. The general nature of its business, as stated in its articles was, as follows:

> "To construct, maintain and operate one or more booms for the collection, safe-keeping, scaling and delivery of logs and lumber, and the charging and collection of reasonable tolls and compensation therefor, to be fixed from time to time by the board of directors of the company; said booms, fixtures and appurtenances belonging thereto to be upon and adjoining the southerly shores of the Rainy Lake River * * * in Beltrami and Itasca counties in the state of Minnesota."

The Court said:

> "It is true that defendant's articles of association state that it was incorporated under the provisions of Title II, but that is not conclusive. In determining the real character of a corporation reference must be had to that portion of the articles of association expressing the general nature of its business. It cannot be made one kind of corporation merely by being labeled as such, if its declared objects show it to be something else. (Citing *State v. Minnesota Thresh. Mfg. Co.*, 40 Minn. 213).

> Taking defendant's articles of incorporation *as a whole*, it is clear that it was incorporated for the purpose of carrying on and conducting the business authorized by the act of 1889. It must therefore be held to come within and be entitled to the benefits of that statute."

In the case just cited the plaintiff relied upon the previous case of *Northwestern Improvement & Boom Co. v. O'Brien*, 75 Minn. 335. But in that case, the Court held that the declared purposes of the plaintiff company did not bring it within the purview of the statute authorizing a lien.

It was claimed by the plaintiff in that action that it was organized under Title I, Chapter 34 and amendment of 1889, and that it had the right to charge toll and have a lien on the logs driven for such toll.

It was alleged in the plaintiff's complaint, that the plaintiff was organized "for the purpose of improving the navigation of Kettle River for logs, * * * in order to facilitate the driving, floating, holding, handling and assorting of logs, timber and lumber upon said Kettle River."

The language of the section, number 2633 Statutes of Minnesota, 1894, giving the lien is that, a corporation organized for "the improvement of any stream for driving logs therein," shall have a lien. In other words, it was distinctly held that in order to entitle itself to the benefits conferred by the amendment to Title I giving a lien, *it must be shown by the declared purposes of its organization that it comes squarely within the provisions of the amendment.*

In the case at bar, it does not appear from the articles of incorporation (see page 32, Transcript of Record) under what section of the statutes this complainant was organized. Excluding the general nature of its business as declared in the first article, there is absolutely nothing in the entire document inconsistent with its being organized under either Title I or Title II. It complies in all particulars with the requirements of both Titles. It must, therefore, fall under whatever Title the general nature of its business, as declared in the first article, places it.

Under Title I, a corporation may continue for *fifty* years. Under Title II, it may continue for only *thirty* years. Under the second article, the continuance of this corporation is placed at fifty years. This, we think, is the only indication in the entire articles that the incorporators may have had in mind that they were incorporated under Title I. This, of course, in no way affects the validity of its organization under Title II. The law would simply disregard the excess of twenty years and fix the period of its continuance at the legal limit, to-wit, thirty years, assuming that it was otherwise properly organized under Title II.

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. R. 116-138.

Here is a case where the familiar rule of construction must necessarily apply. The complainant corporation prepared its own articles of incorporation. If it is held that it was organized

under Title I, it became, at the time of its incorporation, invested with the power of eminent domain. If it was organized under Title II, it is conceded that it could exercise no such power. Whether or not it is to be held to come under Title II, must be determined, under the decisions of the Supreme Court of Minnesota, upon the construction of *the general nature of its business as declared in its articles.*

We do not insist upon the strictest rule of construction which is invariably applied to such cases, and that is, that the language used must be most strictly construed against the corporation. We would invoke only the ordinary rule of fair common sense interpretation.

As we shall show hereafter, there is now, and always has been, a marked distinction between "*railroads*" and "street railroads." They are two separate and distinct kinds of railways, not only in common parlance, but in all statutory enactments and judicial decisions.

If this company, by the language used in declaring its purposes is to be placed under Title I, Chapter 34, Revision of 1866, that language must be *reasonably clear* and *unequivocal.*

If the incorporators had in mind doing what the complainant's attorneys allege in the Amended Bill they were organized to do, they would certainly have had no trouble in easily stating it.

Complainant alleges in its Amended Bill of Complaint that "it was organized for the purpose and with the power, among other things, of owning and

operating *street railway lines within said City of Minneapolis, and the building, owning and operating of railroads within Hennepin County, Minnesota.*"

According to the allegations of the Amended Bill it is claimed to be a *hybrid* sort of a corporation. It was organized to *build street railways* and it was also organized to *build railroads.*

If it could not be properly organized under Title I, Chapter 34, Revision of 1866, as a street railway, then counsel insist that it must still fall under Title I, Chapter 34, because it was organized for the purpose of building, owning and operating of "*railroads*" in Hennepin County, Minnesota. But it is obvious that the allegations of the Amended Bill are *radically different* from the declared purposes of the articles of incorporation. The latter language will not for a moment permit of such a construction as counsel have placed upon it. There is not a suggestion or intimation anywhere in the articles to the effect that this company is organized to either construct or operate any railway line *off* from the streets and highways of Minneapolis and of its suburbs.

The language of the first article is no different than had it been as follows: "The general nature of its business is to construct and operate railways in the streets and highways of the City of Minneapolis and (*in the streets and highways of*) its suburbs in the County of Hennepin." The italicized words are inserted for the purposes of the illustration.

If the complainant was properly organized under Title I, Chapter 34, Revision of 1866, either as a railroad or as a work of internal improvement which requires the taking of private property or an easement therein, it was, by the provisions of that Title, invested with *the power of eminent domain.* Whether or not it has that power or had it, depends upon whether or not it should be construed as a "railroad" or as a "work of internal improvement which requires the taking of private property or an easement therein."

If, as we have shown, it cannot, by any fair construction, be classed as a "railroad," then the question arises, is it a work of *"internal improvement which requires the taking of private property or an easement therein?"* It must be remembered that the provisions of said Title I, Chapter 34, not only define the kind of a corporation which may be organized thereunder, but also grant the *power of eminent domain* and *prescribe* the *method* and *manner* of its exercise.

The authorities are all one way to the effect that a *"street railway"* has not the power of eminent domain. As a general proposition, it does not require the exercise of such power. It is simply in aid of street travel. It is laid upon the surface of the streets; must conform to the grades of the streets; must stop at convenient places for local traffic, and, in general, can only be laid upon the streets by permission of the local authorities. This distinction between "street railways" and "com-

mercial railroads" is very marked and everywhere recognized.

If the complainant is entitled to exercise the right of eminent domain, it is because by its declared purposes, it has brought itself within the purview of the statute conferring the right to exercise such power.

It is a general proposition, so well established as to require no citation of authorities, that no corporation can exercise the right of eminent domain unless it is able to show *legislative authority* to do so, and that the power must be *clearly granted,* and that every presumption is against its exercise. See *Minnesota Canal & Power Co. v. Koochiching Co.,* 97 Minn. 435.

Minneapolis & St. Louis R. R. Co. v. Nicolin, 76 Minn. 302.

In the latter case, Chief Justice Start, writing for the Court, said:

> "Authority for the petitioner to take land by condemnation for the purpose in question must be found, if at all, in the statute. If it is doubtful whether the statute confers the authority, the doubt must be resolved against the petitioner, no matter what the necessity of the case may be; for it is attempting to exercise one of the highest prerogatives a sovereign can delegate to a subject."

Again in the same case it was said:

> "It (power of eminent domain) can be exercised only within the strict terms of the grant and subject to the constitutional restrictions."

Cyclopedia of Law and Procedure, Volume 15, page 567, lays down this rule:

> "Inasmuch as the right of eminent domain is one which lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions, and agencies for its exercise, the right to exercise the power must be conferred by statute, either in express words or by necessary implication. The power should not be gathered from doubtful inferences, but should be unmistakably expressed."

Citing a large number of cases from various jurisdictions fully sustaining the text.

And again on the same page of the same authority it is said:

> "The power of eminent domain being in derogation of the common right, acts conferring it are to be strictly construed, and are not to be extended beyond their plain provisions."

Can it be said that Title I, Chapter 34, Revision of 1866, was unmistakably intended to confer upon *"street railway companies"* the extraordinary right to exercise the power of eminent domain? There were no street railways in the State at the time. The word "railroads" or "railways" had been invariably used to mean simply commercial steam railroads.

The heading to this Title is, *"Of corporations empowered to take private property for public uses."* Street railways invariably had no necessity for condemning property for their right-of-way, for their tracks were laid by permission of municipalities upon the surface of the streets.

It has already been shown that when the power of eminent domain was subsequently conferred upon street railways, it was expressly limited in its exercise to territory *outside* of cities. The *power of eminent domain* is, as before remarked, conferred upon corporations by the same chapter by which their organization is authorized.

Under all the authorities, Section 1 of that Title, (Title I, Chapter 34), should be strictly construed and limited to those corporations which in this and other jurisdictions have usually been invested with the extraordinary power of eminent domain.

The learned Judge of the Lower Court proceeded upon the idea that *quasi* public corporations or public service corporations could only be organized under Title I, and that, when so organized, they were instantly invested with the right to exercise the power of eminent domain.

The reasoning of the Lower Court leads to the inevitable conclusion that, by the enactment of Section 1, Title I, the legislature intended to authorize the incorporation of every kind of a *quasi* public enterprise; and by the same Title invested such corporations with full power of eminent domain. In other words, the legislature, by the Revision of 1866, *exhausted* itself in authorizing the formation of corporations which might exercise the power of eminent domain.

Section 1 of Title I of said Chap. 34 specifically names only four kinds of enterprise for the carrying on of which corporations may be organized under that Title, to-wit, railways, telegraphs, canals

or slack water navigation. But, according to the reasoning of the learned Judge of the Lower Court, the general designation "all works of internal improvement" which require the taking of private property or any easement therein, includes every kind of *quasi* public corporations.

This reasoning is obviously in a circle. Whether a certain corporation may be organized under this general designation of "internal improvement" we must first determine whether it requires the taking of private property or any easement therein. Then after the organization, if any question arises as to whether it is such a corporation as may exercise the power of eminent domain as granted by the same Title, we must determine whether the corporation is properly organized under Title I. That such was not the intention of the legislature, is obvious from the history of subsequent legislation.

If Section I of Title II of Chapter 34, Revision of 1866, was fairly to be construed as claimed by complainant's counsel and as stated by the learned Judge of the Lower Court, there could have been no occasion for the subsequent amendments made by the legislature.

In the statutes of Minnesota, 1894, we find the following enumeration of the kinds of enterprise which may be organized under said Title I: "Railways, telegraph lines, canals, slack water or other navigation upon any water course, bay or lake, dams to improve or create a water supply or power for public use, and any work or works with all requisite subways, pipes and other conduits for sup-

plying the public with water, gaslight, electric light, heat or power."

These are all obviously *quasi* public enterprises, and, according to the contention of complainant's counsel, any and all of these enterprises might, under Title I, Chapter 34, of the Revision of 1866, have been organized thereunder, and thereby have become invested with the right to exercise the power of eminent domain, to the full extent granted in that chapter, and yet by the amendment of 1873, Chapter 13, General Laws of 1873, gas companies are expressly enumerated as organizable under the provisions of Title II, while several other *quasi* public enterprises are also specifically named and their organization as corporations authorized under the same Title.

Now, the list of so-called *quasi* public corporations or public service corporations is a long one. Elevators have, by this Court, been held to be public corporations.

See *Munn v. Illinois*, 94 U. S. 113.
Brass v. North Dakota, 153 U. S. 391.
W. W. Cargill Co. v. Minnesota, 180 U. S. 452.

And yet elevators are expressly enumerated in the amendment of 1873 as a purpose for which corporations could be organized under Title II of said Chapter 34. No one would contend that elevators are entitled to exercise the power of eminent domain.

The organization of corporations for the purpose of operating or constructing public docks and ware-

houses, are authorized by the amendment of 1873. These enterprises are peculiarly *quasi* public; while manufacturing and distributing gas, which is one of the heads mentioned in the amendment of 1873, is also a well recognized public service. And yet gas companies were not invested with the right to exercise the power of eminent domain until 1893.

The reasoning of complainant's counsel and also of the learned Judge of the Lower Court is to this effect.

A street railway is a work of internal improvement. It also requires the taking of private property or an easement therein. It, therefore, could only be organized in June, 1873, under the provisions of Title I, Chapter 34, of the Revision of 1866.

As we have before pointed out, the provisions of Section 1, Title I, must be strictly construed, while the provisions of Title II should be liberally construed to the end that it may include all corporations for pecuniary profit not expressly provided for by Title I.

It is certainly just as reasonable to say that an elevator or a public dock or warehouse or gas plant is an internal improvement and that it requires the taking of private property or an easement therein, as it is to say that a street railway is an internal improvement and requires the taking of private property or an easement therein.

An elevator must be located so as to be convenient to the public and at the same time accessible to railroads or steamships. It must be located either upon a right-of-way or near to one.

Plausible arguments may easily be made in favor of extending to such elevators the right to exercise the power of eminent domain. With reference to public wharves, the same may be said; and yet, no one would contend that in 1866 either elevators, public docks, warehouses or gas plants could exercise the power of eminent domain under the statutes of the State of Minnesota.

So far as the right-of-way of a street railway is concerned, there is absolutely no necessity for its exercising the power of eminent domain. This the learned Judge of the Lower Court recognized. But the latter said (see page 129 of the Record) it would or might "need the exercise of the power of eminent domain for many other purposes, such as obtaining *sites for shops and for other buildings necessary for the conduct of the business.*"

This suggestion of the learned Judge is fully met and adversely decided by many cases to which we shall hereafter call the attention of the Court.

On the argument in the Lower Court, the learned counsel for the complainant made this statement: "Our powers are to own and operate a street railway and a commercial railway." They cited as their authority for such a statement the articles of incorporation to which reference has already been made (see page 32), and which read as follows: "to construct and operate railways in the streets and highways of the City of Minneapolis and its suburbs in the County of Hennepin." Counsel claim that the complainant can operate street railways within the limits of the City of Minne-

apolis, and a commercial railway both inside and outside of the City of Minneapolis and within the limits of Hennepin County.

This seems to us little short of the ridiculous. That this company was organized as a street railway company pure and simple, admits of no reasonable doubt. After its organization, it procured from the City of Minneapolis the franchise in question. It built a street railway line upon the streets of the City of Minneapolis, and operated the same for many years as a horse street railway.

In 1890, it abandoned the horse street railway, and by permission given by the City Council of the City of Minneapolis, installed a modern and complete electric system. It has always confined its operations to the streets of the City of Minneapolis. It has never pretended up to the time of the argument in the Lower Court, that it was anything else than a street railway. As before stated, the very name it assumed implies the general nature of its business, while the declaration, which the law required it to make in its articles of incorporation, confined its business strictly to a street railway proposition.

Even if the technical construction now claimed by complainant's counsel were permissible, the operation of railways in the suburbs of Minneapolis in Hennepin County, would clearly be but a mere incident to its main and principal business. This point is decided against the complainant in the case which we have already cited—*Minneapolis & St. Paul Suburban Railway Co. v. Manitou*

Forest Syndicate, 101 Minn., page 132.

As will be noticed by an examination of this case, the general nature of the business of the Minneapolis & St. Paul Suburban Railway Company was very broadly stated. It included not only suburban street railway lines but also many other kinds of business, including the operation of electric and lighting plants.

The Court said:

> "While no doubt the construction and operation of electric and lighting plants is a business which might be organized under the provisions of Title II, and conceding there was no statutory authority for the purchasing by one corporation of another line of street railway, or stock therein, yet these purposes seem to be merely incidental to the main purpose, as *expressed in the articles considered as a whole.*"

If, therefore, in any case the general nature of the business as declared in the articles of incorporation unmistakably places the corporation under a particular title, as the Courts of Minnesota have so often declared, the mere fact that some other kind of business may be included in the declaration which, standing alone, would properly class the corporation under another section, does not materially affect the case.

Applying that doctrine, which is sound from the standpoint of authority and reasonable in every aspect, to the facts of this case can it be claimed for a moment under this Bill of Complaint that the complainant's main and principal purpose was to construct and operate anything but a street rail-

way line pure and simple, in the City of Minneapolis?

Is it not to ignore the very substance of the transaction and catch at a mere shadow to say that even if it were to be conceded that, technically speaking, this complainant was authorized under Section 1 of its articles of incorporation to operate a *commercial railway in the suburbs of Minneapolis*, such a purpose was the main one set forth in such articles and should characterize the corporation so organized? It seems to us that it is merely catching at straws, on the part of the complainant, to make such a claim.

In the case just cited, the title of the corporation was Minneapolis & St. Paul Suburban Railway Company, and while it was declared in the articles that it was organized under Title II of Chapter 34, General Statutes 1894, yet the declared purposes of the corporation were so manifestly those of a *suburban railway*, that the court said that it could not confine the corporation to the streets, although the word "street" was used in connection with the term "railway."

The Court flatly held in that case that the word "street" was obviously not used in the articles for the purpose of limiting the corporation to *the provisions of Title II*. This, it will be seen at a glance, is necessarily deciding, by implication, that a street railway as such is properly organizable under Title II.

The same counsel who appear for the complainant in this case were counsel for the plaintiff in the

case just cited. And in their brief on appeal, the principal argument in favor of their position was that, because the plaintiff was *not a street railway* but was, in fact, a suburban railway, it was invested with the power of eminent domain. Why it should have been necessary to have pursued this line of argument if, as they now contend, whether it was a street railway or a suburban railway, it was still a *railway* within the meaning of the law and necessarily must be organized under the provisions of Title I, Chapter 34, is not obvious, except that the necessities of this case compel them to now take the latter position.

Some idea of the confusion, as it seems to us, into which counsel for complainant have fallen, may be obtained from the following quotation (page 142 of the stenographer's transcript of the argument in the Lower Court). Judge Koon, one of the counsel for complainant, said:

> "When, if a street railway is now recognized by the statute of this state as a public corporation authorized to take property, when did it become such? How is it changed in any way? Is not a street railway today just what it was in 1866, only that there wasn't any then and the legislature made no provision for them at all? There wasn't one in the State. It was never thought of."

Of course, the answer to the first question is perfectly simple and easy. The legislature of this State in 1899, Chap. 350, Laws 1899, gave to street railway companies the limited right to exercise the power of eminent domain *outside of cities*. This

was the first time that such right, either inside or outside of a city, was recognized by statute.

Our contention has been throughout this litigation, that this complainant was properly organized only under Title II, Chapter 34, Revision of 1866 as amended by the laws of 1868 and 1873. And further, that it could not be organized under any other Title. Further, that it never had the right to exercise the power of eminent domain, either within or without the City of Minneapolis, until the legislature of 1899 gave to street railway companies the right to exercise such power *outside of cities.*

It, of course, was perfectly competent for the legislature to provide for the organization of railroads, canal companies, plank roads and turnpikes, sluice-ways and slack water improvements under one Title, and street railways, transportation companies, docks, elevators, warehouses and any number of other kinds of enterprise under another Title or different Titles.

It was, moreover, perfectly competent for the legislature to give to railroad companies, as such, the power of eminent domain; and also to give companies, such as plank road companies, turnpikes, slack water improvement, etc., the right to exercise the power of eminent domain. It could also give the right to exercise the power of eminent domain, in general terms, or in a qualified degree, to street railway companies, to elevators, docks, warehouses, gas companies, water companies and electric light companies.

There is no force whatever in the implied contention that the legislature can only give the right to exercise the power of eminent domain to corporations organized under Title I. The only limitation whatever upon the legislature, with reference to granting the power of eminent domain is, that such power may not be granted except to *quasi* public corporations or enterprises, and then only when they are devoted or dedicated to a public use.

Counsel not only admit that there were no street railways in the State in 1866, and that no express or specific provision had been made for them, but they add that such things had never been thought of.

This brings us squarely to the proposition, which has already been discussed in several of the cases cited—that, the presumption is, that the legislature when it enacts a statute, is dealing with the known and not with the unknown, with something that is in existence and for which legislation or provision must be made.

A street railway is, as said by the Court in *Minneapolis & St. Paul Suburban Railway Co. v. Manitou Forest Syndicate,* 101 Minn., page 147, nothing but an improvement on the *coach* and the *omnibus,* and is operated for the use and benefit of persons desiring to be transported along the street. It is, necessarily, local and is universally, in all jurisdictions, under the control of the municipalities.

The case of *in re Milwaukee Light, Heat & Traction Co. and Milwaukee Light, Heat & Traction Co. v. Milwaukee Northern Railway Co.,* 112 N. W.

Rep., page 663 (Wisconsin) decided June 20, 1907, is an exceedingly interesting discussion of the history of the organization of railroad companies, and the evolution of the law in Wisconsin with reference to railroads, street railways and rural or suburban railways. There are so many points of similarity in the growth of these enterprises in the States of Wisconsin and Minnesota, and such analogy between the evolution of statutory enactments with reference to such enterprises in the two States, that we wish to call special attention to the case.

The opinion is too long to permit of its incorporation into this brief. We must content ourselves with summarizing the points decided.

It will be noticed, in passing, that, prior to 1872, in the State of Wisconsin, there was no general law permitting the organization of railroad corporations. The Court in the case above cited, observes that all such corporations had been organized prior to that time under special charters.

Chapter 73 of the Revised Statutes of 1858, Wisconsin, provided generally for the formation of joint stock companies, with the usual powers of corporations, "for the purpose of carrying on any kind of manufacturing, mechanical, mining, or quarrying business, or any other lawful business, by the adoption of articles of agreement in writing."

The foregoing chapter is the only one authorizing the organization of corporations in the State of Wisconsin, the statutes of that State then calling corporations, "joint stock companies"; this term

being used until some years later in the place of corporations.

By Chapter 313, General Laws 1860, (Wisconsin) authority is given to municipalities to grant the use of streets to street railway companies "organized under any general or special act of the legislature of this State," etc.

Section 2 of the act refers again to street railroad companies which are or may be so organized. Here is a recognition by the legislature of what seems to be very obvious that, street railroad companies were regarded as enterprises, which might be incorporated under the general laws, and the only general law with reference to the organization of joint stock companies is the one above referred to.

There was not, at that time, any general law authorizing the organization of railway companies, and no such law was passed until 1872, one year after the constitutional amendment went into effect forbidding the passage of special charters. A street railway company, therefore, had to be organized under the general provisions of Chapter 73, Revised Statutes of 1858, or not be organized at all.

There is absolutely no authority whatever granted by the statutes of Wisconsin to a street railway company to exercise the power of eminent domain. Nor, has it ever been granted to street railway companies as such, but only to such suburban or interurban lines occupying territory outside of cities.

Chapter 313, of the General Laws of 1860, Wisconsin, remained in force until the Revision of 1878, and then it was expressly provided by Section 1862, Chapter 87, that corporations for constructing, maintaining and operating street railways may be formed under Chapter 86 and shall have powers and be governed accordingly. Although this section appears in the chapter under "railways" it was expressly provided that street railways shall be incorporated under Chapter 86, *which is the general law regulating the organization of private corporations.*

It, therefore, conclusively appears that *street railways* have never fallen under the designation of "railways" or "railroads" nor had the power and privileges of railways. They have always been in a distinct class of their own.

As pointed out in the case last above cited, there were, in 1907, in the State of Wisconsin, three classes of railways: Commercial railways, street railways, and suburban or interurban or rural railways. Only the first and last of these classes have ever been invested with the power of eminent domain.

It may be added that there is not to be found in the decisions of the State of Minnesota a *single suggestion* that *street railways* have ever been invested with the general power of eminent domain.

Street railways, as a class, have always been differentiated from railways. And the case of *Minneapolis & St. Paul Suburban Railway Co. v. Manitou Forest Syndicate, supra,* holds by necessary

implication, that street railways, as such, are not railway corporations and have never been invested with the power of eminent domain.

As we have before stated, the last mentioned case in effect decides the question which we are here discussing in favor of the appellant. It holds that a street railway, as such, could not be organized under Title I, Chapter 34, Revision of 1866, and that it could be organized under Title II thereof.

It further holds that, prior to the enactment of Chapter 350, General Laws of Minnesota for 1899, street railway companies were not invested with the power of eminent domain.

In the case just cited, it was the contention of the plaintiff, through the same counsel who now represent the respondent, that it was entitled to the power of eminent domain, *because* it was not, in fact, a *street railway company;* and in the decision of the Court, bottom of page 145, it is said:

> "Although the articles state that it is the purpose of the company to purchase, lease, build, own and operate street railways, the word 'street' is not significant, because the context shows that the articles do not refer to that class of railways. The railways described in the articles are suburban railways, extending from the city limits of St. Paul and Minneapolis to and into outlying cities, towns, and villages within the State of Minnesota."

The Court evidently applied to the construction of the articles of incorporation of the plaintiff, the familiar rule that the force and effect of general

statements will be overcome by specific enumerations.

As stated by the Court, although there was the general statement as to purchasing, leasing, building, owning and operating street railways, the purpose of the corporation was *specifically set forth in detail,* showing that it was, in reality, a *suburban railway wholly outside of the limits of cities.*

In the same case, the Court, further on in the decision, said (see top of page 146):

> "The proposed railways are to run from the limits of the cities to distant cities and villages, through land where there are no streets; and hence the word 'street' was not used in the articles for the purpose of *limiting the corporation to the provisions of Title II.*"

This declaration of the law of this State was made by the Court in accordance with the contention of the plaintiff in that case.

Again the Court says, on page 150:

> "In Section 2593, G. S. 1894" (this section with some enlargements corresponds to Section 1, Title I, Chapter 34, Revision 1878, and also to Section 1, Title I, Chapter 34, Revision of 1866) "street railways were not specifically mentioned; *but the right of eminent domain was conferred upon such roads outside of cities and villages by Chapter* 350, *p.* 461, *Laws* 1899."

Right in this connection it must be remembered that complainant's counsel is here claiming that street railways have *always* had the right of eminent domain,—*at least since the Revision of* 1866.

We wish to call attention right here to the language of said Chapter 350, General Laws of Minnesota for 1899. It is headed "*An act providing for condemnation of right-of-way by street railway companies in certain cases.*" It will be noticed that this act only refers to *right-of-way*, while, by Section 13 of Title I, Chapter 34, Revision of 1866, the power of condemnation was given to railways not only for a right-of-way for the construction of any railroad or telegraph line, but also for "all necessary sites and grounds for depots, shops and other buildings requisite for the proper carrying on of the business to be transacted."

The learned Judge of the Lower Court (see page 129, Transcript of Record) said that it may be true that a street car company, which confines its tracks entirely to the streets "*as it properly ought to*" and "*ought to be expected to do*" would not need to exercise the power of eminent domain for the purpose of obtaining a right-of-way, if it obtained that right-of-way from the City Council; but "it would or might need the exercise of the power of eminent domain for many other purposes, such as obtaining sites for shops and other buildings necessary for the conduct of the business."

An examination of the statutes of this State as well as the decisions of the Supreme Court of this State, will bear out the statement that there never has been any power of condemnation conferred upon street railways in this State for any other purpose than for a *right-of-way*, and in that case, *only outside of cities.*

We have already referred to the *title* of said Chapter 350, General Laws of Minnesota for 1899. The *Act* is as follows:

> "Any corporation organized under the laws of this State for the purpose of constructing a *street railway* in this State, wholly or partly without the limits of any city or cities, shall have the right to *acquire* and *occupy private right-of-way through any portion of its route outside the limits of any city or cities* whenever deemed necessary by such corporation and *for that purpose* shall have the right to exercise the power of eminent domain, including the crossing of intervening highways when necessary, and the provisions of Sections 2605 to 2616, both inclusive, and Section 2642, Statutes of Minnesota, 1894, so far as consistent herewith shall apply to and govern the exercise of such right."

The enactment of said Chapter 350, Laws of 1899, is utterly inconsistent with the claim of the complainant here. This is the first enactment appearing in the legislation of the State of Minnesota, which suggests that street railway companies are invested with the power to condemn private property for any purpose. And here it is only a qualified right. It relates only to *right-of-way*, and then only in certain cases, to-wit, *"outside the limits of any city or cities."*

The act then provides that sections 2605 to 2616, both inclusive, (all of which said sections appear in Title I, Chapter 34, Statutes of Minnesota 1894), and also Section 2642 (which appears in the same Title and relates to crossings by railroads) shall apply to such street railways.

Taking the history of the legislation of this State from 1866 down to 1899, and considering the undisputed fact that beginning with 1866, the right to condemn was given by and in the same Title and the same chapter which authorized the formation of railroads and other corporations which require the taking of private property for a public use; and that the same conditions existed until the Revision of 1878, when the same provisions as to incorporation and to the right to exercise the power of eminent domain, with some enlargements, were put into that revision; and then continued in that way until the Revision of 1894; and again appeared under Title I, Chapter 34, Revision of 1894, and thus continued until the *qualified right to exercise the power of eminent domain in certain cases*, to-wit, *outside the limits of cities*, and for one purpose only, to-wit, *for right-of-way* was given to street railways in 1899—it would seem to be absolutely certain that the legislature of this State had neither considered nor intended that *street railways*, as such, could be organized either as a railroad or as any other enterprise under Title I, Chapter 34, Revision of 1866, or Revision of 1878, or Revision of 1894.

It would certainly seem to be doing the utmost violence to the various statutes of this State to hold that street railways, when they were not specifically mentioned in the Compilation of 1849-1858, nor yet in the Revision of 1866, nor yet again in the Revision of 1878 nor even in the Statutes of 1894, had greater power and privileges than they have

ever had since the passage of Chapter 350 General Laws of Minnesota for 1899.

The Supreme Court of Minnesota in the case just cited (101 Minnesota) speaks of Chapter 350 *as conferring* the power of eminent domain upon street railways in certain cases and for certain purposes.

The Appellee here, in order to sustain its contention, must insist that this enactment of 1899 did not, in fact, *confer* any power but rather *curtailed* a general power which street railways had always possessed.

Still again, in the Revision of 1905, (which was, in fact, a complete revision of the Statutes of Minnesota) where, for the first time in the history of the legislation of the State, street railways are mentioned in connection with public service corporations and railways (see Section 2841), and where the power of eminent domain is given in general terms to corporations organized under Section 2841, there appears this proviso: *"Provided, that no street railway company shall have or exercise such right within the limits of any city or village."*

It was held in the case of *Minneapolis & St. Paul Suburban Railway Co. v. Manitou Forest Syndicate*, 101 Minn. 132, that this proviso was limited to street railway companies pure and simple, and did not reach suburban railways.

In 1871, the people of Wisconsin, adopted an amendment to the constitution forbidding the passage of special laws granting corporate powers and privileges except to cities.

A similar amendment to the constitution was made in the State of Minnesota on November 8, 1881.

Chapter 119 of the Wisconsin Laws of 1872, provided for the formation of railroad corporations and to such railroad corporations was granted the right of eminent domain. No specific mention of street railways was made in that chapter, and speaking of the scope of that chapter, the Court, in the above cited case said:

> "The formation of street railroad corporations was not authorized thereunder."

An examination of Chapter 119 of the Wis. Laws of 1872, will show that, while there is no limitation upon the word "railroad," the various provisions of the chapter show unmistakably, (as does Title I, Chapter 34, Revision of 1866, Minnesota), that only commercial steam railroads are thus authorized to be incorporated.

Chapter 144 of the Laws of 1872, Wisconsin, provides for the formation of corporations for business and manufacturing purposes of various kinds, excluding, however, "banking, insurance and operating railroads." This chapter also repealed Chapter 73 of the Revised Statutes of 1858 relating to joint stock companies, to which reference has just been made.

Chapter 146 of the Laws of 1872, Wisconsin, provides for the formation of corporations for "other than manufacturing, mercantile, insurance, banking, transportation and trading purposes."

The Supreme Court of Wisconsin says:

> "None of these laws contained any provisions for the organization of street railroad corporations, but the provisions of Chapter 313, p. 302, of the Laws of 1860, remained in force. Thus the law stood until the passage of the Revised Statutes of 1878, with apparently no means provided for the organization of street railroad corporations."

Right here we wish to observe that the Supreme Court of Wisconsin assumes and decides that street railway corporations could not be organized under the general railroad statute. Second, it decides that street railway companies could not be organized under Chapter 146 of the Laws of 1872, because that chapter expressly excludes "manufacturing, mercantile, insurance, banking, *transportation* and trading purposes."

In Minnesota, Title I, Chapter 34, Revision of 1866, relates to the organization of railroad corporations and works of internal improvement, requiring the exercise of the right of eminent domain; while Title II of the same chapter provides for the organization of corporations organized for various purposes, *including*, as the statute was amended in 1868, *transportation* and *insurance*, and in 1873 for carrying on and *operating elevators, leasing and operating docks, warehouses, hotels, manufacturing gas*, etc., and "any lawful business."

It will be noticed that Chapter 146 of the Laws of 1872, Wisconsin, expressly *excludes transportation* companies; while Title II of Chapter 34, Revision of 1866, Minnesota, as amended in 1868 and 1873, expressly *includes transportation*.

The Court proceeds in its analysis of the chapters of the statutory enactments and comes to the Revision of 1878.

Chapters 144 and 146 of the Laws of 1872, were condensed and united into Chapter 86 of the Revision of 1878: "It being provided, however, that corporations for the purpose of engaging in banking, insurance, building or operating railroads or plank or turnpike roads could not be formed thereunder."

It will be noticed that Chapter 86 of the Revision of 1878, Wisconsin, corresponds very closely with Title II, Chapter 34, Revision of 1866, Minnesota, and the still later Revision of 1878, Minnesota.

Section 1771 of said Chapter 86 provides for the organization of corporations for the carrying on of various kinds of business, expressly excluding, however, *insurance, building or operating railroads* or *plank* or *turnpike roads* or *other corporations otherwise specially provided for.*

It names among the kinds of business for which such corporations may be organized, among many others, *"constructing, leasing or operating docks, warehouses, elevators or hotels."* It will be noticed that these are the precise words of the amendment of 1873, Minnesota.

In the Revision of 1878, there were added to what had formerly been Chapter 313 of the Laws of 1860, these words: "Corporations for maintaining and operating street railways may be formed under

Chapter 86, and shall have power and be governed accordingly."

The Supreme Court of Wisconsin sums up the situation at the time of the Revision of 1878, as follows:

> "At this time then, the law stood thus: General commercial railroads with the power of eminent domain could be formed under Chapter 87, while street railroad companies without the power of eminent domain, but with the power to accept franchises from a municipal corporation to *operate the cars upon the streets*, and with the consent of the supervisors to operate them upon the highways of *adjoining* towns, might be formed under the provisions of *Chapter* 86, as modified by section 1862."

It seems to us that a similar summary of the Minnesota statutes might be made with equal propriety and for the same reasons.

The Court said:

> "At this time (1878) there was little if any, thought of the possibilities of the *modern interurban railroad*, and the street railroad itself was a modest affair, depending for its motive power on animals exclusively, and content to perform the functions of a carrier of passengers upon the *streets of a city* and its *immediate suburbs*."

The Court further observes that for an ordinary street railway running upon the streets of a city and its immediate suburbs, the legislation was ample, but that no provisions were made for an interurban railroad carrying passengers and freight through the open country, from city to city; nor, were there any provisions by which a street rail-

road company, as such, could enlarge the scope of its business so as to perform those functions.

It then proceeds to discuss Chapter 221 of the Laws of 1880, by which Section 1863, Revised Statutes 1878 was amended; and this amendment, the Court holds, provides for a third kind of railroad, to-wit, rural suburban lines or interurban lines.

We may summarize the history of railroads in the State of Wisconsin, as follows:

First: General laws for the organization of railroad corporations,—it being held that street railways or street railroads do not fall under the heading of railroads. Railroads organized under these general laws, are invested with the right to exercise the power of eminent domain.

Second: Authority for the organization of street railways, the right of eminent domain, however, being denied to such corporations, street railways, as such, being organized under Chapter 86 of the Revised Statutes of 1878, which corresponds so closely to the provisions of Title II, Chapter 34, Revision of 1866 and the later Revision of 1878, Minnesota.

Third: Authority under Chapter 221, Laws of 1880 for the organization of suburban rural railways.

It will be noticed that it is assumed, all the way through the discussion in the case last cited, that street railways, as such, have never been invested

with the power of eminent domain; while railroads (meaning commercial steam railroads) have, since the laws of 1872, been invested with such power, and suburban or rural railroads were invested with such power in 1880, at the time when provision for their incorporation was made.

This, it is safe to say, is practically the history of the same corporations in the State of Minnesota:

First: Railroads were invested with the power of eminent domain by Title I, Chapter 34, Revision of 1866.

Second: Street railways were properly organized under Title II, Chapter 34, Revision of 1866, but were not invested with the power of eminent domain.

Third: Purely suburban or rural railways, provided for by the Revision of 1905, Minnesota, are invested with such power.

Minneapolis & St. Paul Suburban Railway Co. v. Manitou Forest Syndicate, 101 Minn. 132.

The Supreme Courts of Wisconsin and Minnesota have followed very closely the same lines of reasoning in arriving at this conclusion.

We think, therefore, that we are fully justified, upon the authority of the decisions we have cited and upon any fair construction of the statutes involved, in asserting that this Appellee (1) was organized as a *street railway pure and simple;* and that (2) as such, it did not and could not come un-

der the head of "railroads"; and that, (3) it was not a *"work of internal improvement which requires the taking of private property or any easement therein";* and that (4) street railways were never invested, by the Legislature of this State, with the power of eminent domain until the year 1899 (see Chapter 350, Laws of 1899), and that then they were so invested only for condemnation of *right-of-way outside of cities or villages;* and that (5) this Appellee could be, and was, properly organized as a corporation under Title II, Chapter 34, Revision of 1866; and that consequently (6) the term of its charter was, and *could not exceed,* a *period of thirty* years; and that (7) therefore, any contract alleged in the Amended Bill expired by limitation in July, 1903.

II.

DOES THE ORDINANCE OF THE CITY OF MINNEAPOLIS PASSED ON JULY 9, 1875, AND THE ORDINANCE OF THE CITY OF MINNEAPOLIS PASSED ON JULY 8, 1878, AS RATIFIED AND CONFIRMED BY THE LEGISLATURE OF THE STATE OF MINNESOTA, ON THE 4TH DAY OF MARCH, 1879, CONSTITUTE A CONTRACT BETWEEN APPELLANT AND APPELLEE, AS RESPECTS THE LATTER'S ELECTRIC LINES, FOR AND DURING THE TERMS OF APPELLEE'S CHARTER AS ALLEGED IN SAID AMENDED BILL; AND IS THE APPELLEE ENTITLED TO COLLECT FIVE CENTS FROM EACH PASSENGER RIDING UPON ITS ELECTRIC CARS, AS PROVIDED IN THE ORDINANCE OF JULY 9, 1875?

On the argument in the Lower Court, Complainant's counsel took the position, and will doubtless take it here, that, this case must be determined solely by the language of the grant contained in Section 1 of that ordinance. It is as follows:

> "That the Minneapolis Street Railway Company be, and it is hereby, granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway *line,* with all necessary tracks for turnouts, sidetracks and switches in such streets of said city as the City Council may deem suited to street railways, *subject to the terms, conditions and forfeitures hereinafter contained;* provided, that the City Council reserves the right to limit the said company to the construction of a single track upon such street or streets as it may deem proper."

The contention is that, the grant is for a "passenger railway line" to be run upon such streets as the City Council may deem suited to "street railways," being street railway lines and street railways in the broadest sense of the term, regardless of the motive power.

The Appellant's contention in the Lower Court was, and now is, that, what purports to be a grant in Section 1 of the ordinance in question is expressly made *"subject to the terms, conditions and forfeitures hereinafter contained."*

Section 4 of the same ordinance provides as follows:

> "The cars to be used upon such tracks shall be propelled with either *animal* or *pneumatic* power as the said company deem advisable," etc.

Even if in the grant, contained in Sec. 1, it were not expressly provided that such grant is subject to the terms, conditions and forfeitures thereafter named, all the sections of the ordinance would have to be construed together, and nothing could be considered as absolute in Section 1, if, in fact, any section of the ordinance contained any provision modifying it. But here, what purports to be the grant, is expressly made subject to what follows.

It is precisely the same as though the grant had contained, in express terms, a provision reading "for a passenger railway line on which cars are moved with either animal or pneumatic power." Under every rule of construction which obtains in such cases, the complainant would be limited in its

rights to the means of propulsion expressly provided for.

So far as pneumatic power is concerned, it may be wholly disregarded. No such power has ever been found practicable, and no such power has ever been used by the complainant. It did use for many years, and until about the year 1890, horses and mules to haul its cars—in other words, the original line was a horse street railway.

By the ordinance in question, the complainant was never authorized to run anything else than a horse or pneumatic power railway. If there is anything in counsel's contention with respect to this point, it might just as logically and plausibly be carried still further, and the contention, it seems, would, in such a case, be just as sound, that by Section 1 of that ordinance, the Minneapolis Street Railway Company was granted the exclusive right and privilege of constructing and operating a single or double track for any kind of passenger railway. The only limitation on the grant, according to counsel's argument, is that, it must be a *railway* line and it must be for passengers. But here again our attention is called to Section 4, which expressly provides that no locomotive, freight or passenger cars such as are usually run over railways in this State for the transportation of freight and passengers, shall be used upon any of said track unless authorized by the City Council. In fact, Sections 4, 5 and 6 seem to be intended as limitations upon the so-called grant; and it is difficult to see why counsel might not as well contend that

none of these things affect the grant contained in Section 1, because the *latter is absolute.*

Counsel for complainant emphasized and insisted upon this point, in the Lower Court, that the complainant, under the terms of the grant, was not limited to any particular mode of propulsion.

It must be borne in mind that nothing is complained of in this case by the complainant except with reference to its present *electric street railway line.* It appears affirmatively by the answer, and must be taken as admitted on this hearing, which is on Bill and Answer, that the old horse street railway was abandoned in about the year 1890, and had, prior to that time, become wholly inadequate and practically obsolete (see page 41, Transcript of Record).

The question then is, has the complainant any *contract right* with the City of Minneapolis to operate its *electric* street railway at a fixed rate of five cents per individual passenger for one continuous ride. The burden is on the complainant to establish affirmatively a clear and unambiguous contract and an attempted violation of it on the part of the appellant.

In this case, it starts with the proposition:

First: That it was organized in June, 1873, as a *railroad* corporation under Title I, Chapter 34, Statutes of 1866, and that the term of its charter is, consequently, *fifty years;* and,

Second: That by the Ordinance of July 9, 1875, it was granted the exclusive right and privilege of

constructing and operating, during the term of its charter, to-wit, fifty years from June, 1873, a *street railway line* in the streets of the City of Minneapolis at a fixed rate of five cents per individual passenger for each continuous ride of not exceeding three miles in length.

If, as before argued, the term of its charter was only thirty years, and could be only thirty years under the provisions of Title II, Chapter 34, Statutes of 1866, then its contract expired by limitation in June, 1903; or, if it was granted the right and privilege of constructing and operating only a *horse street railway* in the streets of the City of Minneapolis, then the City has not violated, or attempted to violate, any contract with it, for such *horse* street railway was abandoned by the complainant nearly twenty years ago; and the only lines which it is now operating in the City of Minneapolis are, *electric street railway lines.* The question, therefore, immediately arises, has the complainant shown any contract between it and the City of Minneapolis, with reference to an *electric street railway line.*

Counsel's contention has been that the grant in this case was, as above stated an *absolute* and *unqualified* one to construct and operate a *street railway line*, and that its rights are in no way affected, because, upon certain terms and conditions, it was, in the year 1890, permitted by the City Council (*not by virtue of any contract*) to construct and operate an electric street railway line. If it is now

operating, under permission from the City Council, something which was not necessarily included in its original grant of 1875, then, of course, it is clear that no contract has been violated, or attempted to be violated, for the obvious reason that there is no *contract with reference* to the thing which the complainant is now operating.

Appellant's contention, briefly stated, has always been that the complainant was granted simply the right to operate and construct a *horse street railway* (ignoring, as we may, all reference to pneumatic power).

It is our contention that a *horse* street railway is a separate and distinct thing from either a tramway, a *cable way*, an *elevated road* or an *electric* railway. For the purposes of the argument we might concede that the term "street railway" standing alone, might include any ordinary street railway line, regardless of the motive power used; but a street railway limited in the means of propulsion to animal or pneumatic power, is a horse or pneumatic railway and cannot be construed to be anything else. That this contention on the part of the appellant is not, in any sense, a strained one, is abundantly shown by the authorities.

In the case of *Omaha Horse Ry. Co. v. Cable Tramway Co. of Omaha*, 30 Fed. Rep. 324, a contention quite similar in most of its aspects and analogous in all of them to the one under consideration, was made. In that case, the plaintiff was incorporated under a special legislative charter, dated February 18, 1867. On the 8th day of October,

1868, the Omaha City Council granted to the plaintiff the right to lay out, construct and operate railways in the streets of the city. At the time of the hearing, some time prior to March 5, 1887, the plaintiff had constructed and extended from year to year, and was then operating, over eighteen miles of railway in the City of Omaha, with the necessary equipments—cars, horses, barns and other structures.

The Cable Tramway Co. of Omaha was organized under a general act of the legislature entitled, "An act to provide for the incorporation of street railway companies within the cities of this State," approved February 15, 1877.

At a special election held in 1884, the people of Omaha voted their consent to the construction and operation by the defendant of a cable tramway in most of the streets of the city, including also those on which the plaintiff had then constructed and was operating its horse street railway lines. The plaintiff, as soon as the defendant commenced operations, filed its Bill praying for an injunction against the defendant company.

The special charter, under which the plaintiff was operating, is set out in full in the report of the case.

The first section constitutes the parties named a corporation under the name of the Omaha Horse Railway Company, and gives to the corporation all power and authority incident to railroad corporations within the territory of Nebraska, upon the condition, however, that the corporation shall,

within two years, construct at least one mile of horse railway and have the same in running order and fully equipped.

Section 2 authorizes the company to lay down tracks, turnouts, etc., in the streets of Omaha, and grants to the company the right-of-way over bridges, highways, etc., within the limits of Omaha and within five miles adjacent thereto, and gives to it the right of crossing other railway lines.

There are several other sections of the special charter, but none of them have any special reference to the point under discussion.

In 1875, the Legislature of Nebraska, passed an act entitled, "An act to encourage the building of street railways in the cities of the State of Nebraska." This act provided that, in case of any street railway actually building, constructing and operating at least one mile of railway, within one year from the passage of that act, it should then have the exclusive right for twenty-five years from the date of its organization to build, erect and operate horse railways within the said city in which said company had organized to erect and operate the same.

Mr. Justice Brewer heard and decided the case. It was conceded that the plaintiff had an exclusive right; "but," as stated by the Court, "the initial and important question is, whether a cable tramway is within plaintiff's exclusive grant of a right to build, erect and operate horse railways. If the grant were made today it could not be seriously contended that it was so included."

> "There is," the Court said, "such a clear and recognized distinction between horse railroads and cable roads that, applying the ordinary rules for the construction of legislative grants, neither kind of road would be included within a grant of the other."
>
> "The contention, however," continued the Court, "is that at the time of this grant cable roads were practically unknown; that the only known form of street railways was the horse railway; that the terms 'street railroad' and 'horse railroad' were in common parlance used to describe the same thing; that in construing the grant we are to place ourselves back to the time at which it was made, and these terms, 'horse railroad' and 'street railroad' being then used interchangeably for the same thing, we are to suppose that the legislature meant by the use of one term all that it would have meant by the use of the other, and that therefore all that would today be included within either term was within the scope of the grant."

It may confidently be asserted that the learned Justice here stated, in the most persuasive form, everything that can be stated in behalf of the complainant's contention in the case at bar. But the opinion continues as follows:

> "The rule for the construction of legislative grants is well settled. They are to be construed against the grantee and in favor of the public; and nothing passes until it is obvious that the intent was that it should pass. I do not mean that they are to be construed technically and narrowly so as to defeat the very purposes of the grant, but that, giving to language its ordinary meaning, nothing will be included unless obviously within the scope of such meaning."

The Court then quotes from the language of Mr. Justice Taney, in the case of *Perrine v. Chesapeake & Delaware Canal Co.*, 9 How., 172, as follows:

> "The rule of construction in cases of this description is this, that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public; and the corporation can claim nothing that is not clearly given by the law. We do not mean to say that the charter is to receive a strained and unreasonable construction, contrary to the obvious intention of the act. It must be fairly examined and considered, and reasonably and justly expounded."

Mr. Justice Brewer continues:

> "This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the state has given him a franchise, a right to do that which without the franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the state, as the representative of the public, from according the same right to another."

And right here we would observe that, if Appellee's contention is correct, it has, under the Ordinance of 1875, the absolute and exclusive right to construct, maintain and operate street rail-

way lines in the City of Minneapolis until the year 1923, at the rate of charge fixed in the Ordinance of 1875. It first built and operated a horse street railway, but it had the right, as it is now claimed, to build any kind of a street railway, and it had the further right to exclude any other party or corporation from building any kind of a street railway.

The claim on the part of the Appellee is, necessarily, a broad one. It amounts to the claim of an absolute and unqualified grant of the right to construct and operate any kind of a street railway, and further, such right to construct and operate is exclusive, and continues for a fixed term, with a minimum charge for *one continuous ride,* of not exceeding three miles.

The language of Mr. Justice Taney, in *Charles River Bridge v. Warren Bridge,* 11 Pet. 422, was quoted by Mr. Justice Brewer in the above cited case, and is as follows:

> "Is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and by implication make the terms of a charter in one of the states more unfavorable to the public than upon an act of parliament framed in the same words would be sanctioned in an English court? * * * We think not; and it would present a singular spectacle if, while the courts in England are restraining within the strictest limits the spirit of monopoly, and exclusive privileges in the nature of monopolies, and confining corporations to the privi-

lege plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and the rights of the community than would be done in a like case in an English court of justice."

The opinion further continues:

"Now, placing ourselves back at the time of this grant, what should be attributed to the legislature as its intent? It may be assumed that the only form of street railway in practical use was the horse railway, and that in common parlance the two terms were often used interchangeably. Is it probable that it intended to foreclose the public in advance from all the benefits of possible inventions and discoveries in the matter of street railway travel, and give them to this grantee, or did it not rather intend that its grantee should take that *complete* and *single thing known as a horse railway*, with all of which it was familiar, and retain for the public all of the unknown possibilities of invention and discovery in reference to modes of street railway travel? Did it intend to give that which it knew nothing of or only that which it knew? It seems to me that the mere stating of the question suggests the inevitable answer. Indeed, assuming the conditions to be all as stated, if the legislature had used the words 'street railway' instead of the term 'horse railway,' a very pertinent question would arise whether it intended to grant an exclusive right to any other than that form of street railway, to-wit, horse railway, with which it was familiar. We are bound to assume that the legislature is dealing with the known and not with the unknown, and that when it grants a franchise it only intends to grant that of which it has knowledge; and it is unreasonable to lay stress on the form of language or the words used for the sake of broad-

ening an intent so as to include things not then known. A case most apt and pertinent to this line of thought is that of *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116. In that case the legislature of New Jersey had given the plaintiff the right to build a toll-bridge, with a provision that no other bridge should be built within certain limits for a period of 99 years. Subsequently, the defendant, within the time limited, was proceeding to construct a railroad bridge within the prescribed limits, and this construction was sought to be enjoined by the plaintiffs as an invasion of their franchise. The court of errors and appeals of New Jersey denied the injunction, and on appeal to the Supreme Court of the United States its ruling was affirmed. In the opinion of the Court, Mr. Justice Miller used this language:

'It does not follow that when a newly invented or discovered thing is called by some familiar word which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Matters most intimately connected with the immediate subject of our discussion may well illustrate this. The track on which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term 'road' is applied to it, no doubt, because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen no imagination, even the most fertile, could have pictured it from any previous use of the word 'road.' So we call the inclosure in which passengers travel on a railroad a coach, but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely if ever called coaches. It does not therefore follow that when a word was used in a statute or contract seventy years since, that it must be held to include everything to which the same word is applied at the present day. For

instance, if a Philadelphia manufacturer had agreed with a company seventy years ago to furnish all the coaches which might be necessary to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? or, if a company had then contracted with the government to build and keep up good and sufficient roads to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not then a necessary inference that because the word 'bridge' may now be applied by common usage to the structure of the defendants, that it was therefore the thing intended by the act of 1790.'

"In other words, as a railroad bridge was unknown at the time of the grant, the Supreme Court held that it was not to be included within the exclusive franchise; it was something not thought of by the legislature, and was therefore not within the limits of the exclusive grant. That case is even stronger than this, for a railroad bridge is certainly one form of a bridge, and therefore within the very letter of the grant, but a cable road is not one form of a horse railroad, and not within the strict words of the grant. *Bridge Co. v. Railroad Co.*, 6 Paige 564; *Thompson v. Railroad Co.*, 3 Sanf. Ch. 625; *McRee v. Railroad Co.*, 2 Jones, Law, 186; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529."

How strictly legislative grants of privileges in the nature of monopolies are construed, is seen in the case of *Bridge Proprietors v. Hoboken*, 1 Wallace, 116, just referred to in the above quotation.

If the foregoing cited case may be regarded as an authority, it conclusively, it seems to us, determines this case against the complainant. Under no *possible construction which is permissible in cases of legislative or municipal grants*, can it be said that this grant to the complainant was an *absolute* and *unqualified* one with reference to any and all kinds of street railways, *known* or *unknown* at the time of the grant.

The grant of the right to operate is expressly limited to two kinds of power, *animal* and *pneumatic*. The company first used mules and later on horses; and the reason why "animal power" was used in the franchise, instead of "horses" is probably due to the fact that at that time in some cities mules were being used to some extent, and the broader term was used to include both horses and mules. Pneumatic power was then being experimented with; hence, the use of that term in the franchise.

In the case of *Indianapolis Cable Street Railway Co. v. Citizens Street Railway Co.*, 127 Ind., page 369; 24 N. E. Rep. page 1054, it was held that a street railway company which was authorized by the municipality to build and operate a *cable* line, acquired thereby no right to build either a horse or *electric* line.

The Court in that case held that the rights and privileges granted were, in all respects, to be *strictly construed*, and that nothing was to be taken by *implication* or *intendment*. While the

company was authorized to build a railway line in the streets for the carriage of passengers, the franchise specified that the cars were to be *propelled* by *cables*, thus limiting it to a *cable* line. The Court said:

> "As the grant of a special charter or franchise to a corporation is construed strictly against the corporation, where the right to use *one* motive power is prescribed, the company cannot successfully maintain its right to use *another* or *different power*."

A similar rule was laid down in the case of *Denver & Swansea Railway Co., et al. v. The Denver City Railway Co.*, 2 Colorado Rep. page 673. In that case, there was an exclusive right granted to the Denver City Railway Company to operate a *horse* railway. Under such exclusive franchise, it claimed (as the complainant does here), that what it was, in fact, granted was, the right to construct and operate a *street* railway; and that consequently it was authorized to operate cars by any other motive power not constituting a nuisance.

The grant was in these words:

> "The sole and exclusive right and privilege of building, constructing and operating a horse railroad in the city of Denver, and additions thereto, and shall have the exclusive right and privilege of building and constructing along the streets of said city of Denver, *railroads*, and to run thereon horse cars and to charge each person riding on their horse cars for each passage, not exceeding ten cents."

The company accepted the franchise and operated *horse* cars for several years in the city of Den-

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ver, and in this action it was claimed that it had the exclusive right to operate what is commonly known as street railways. The Court, however, held that the grant must be strictly construed and consequently limited to operating a *horse* street railway and to operating cars drawn upon the lines by horses and not cars propelled by steam or other power.

The Court said:

> "The rule of construction is well settled and not open to question, that grants and franchises, privileges and powers of the character of these claimed by the parties to this action respectively, are to be strictly construed. This rule is applicable in this case, as well as to the municipality of Denver as to the corporations that are parties. The complainant's charter grants to it in terms, 'the sole and exclusive right and privilege of building, constructing and operating a horse railroad in the city of Denver, and additions thereto,' * * * and 'the exclusive right and privilege of building and constructing along the streets of said city of Denver, railroads, and to run thereon horse cars' * * * to 'level upon said streets a track upon which to build, lay and operate their said horse railroads,' * * * and 'to charge each person riding on their horse cars' * * * 'for each passage, not exceeding ten cents'. The exclusive right granted by this language is to construct and operate 'a horse railroad,' 'to run horse cars thereon,' 'to charge fare for riding on their horse cars.' The building and operating by steam a street railway in the city of Denver, by an authorized person or corporation, for the purpose of conveying passengers for hire in said city, is not, in our opinion, an infringement of the plaintiff's exclusive charter right to convey passengers in horse cars for a consideration."

It is impossible, we think, to distinguish the case at bar from the one just cited. The grants in both cases are substantially alike, to-wit, an exclusive right to build, maintain and operate an ordinary horse street railway. It is impossible to differentiate the case under consideration from the one just cited without doing violence to the manifest intent of the former's franchise. Substantially the same contention which the complainant is making here, that it was granted the exclusive right to operate a street railway, has been made in a number of cases, and, so far as we have been able to discover, has never been sustained in any of them.

In the case of *People Ex. Rel. Third Ave. Ry. Co. v. Newton*, Commissioner, (Supreme Court of New York) 1 N. Y. Supp., page 197, it was held that the relator acquired by its grant, only the right to construct and operate a horse railroad, and that it had no authority to construct and operate a cable line.

It was objected that the relator had no right or power to construct such line,—*First*, because it would be subjecting the streets to additional servitude not contemplated by the agreement between the City of New York and the railroad company; *Second*, because it is provided by said agreement that no steam-power be used on any part of the road for propelling cars; and, *Third*, because the power to build a road has been *exhausted* and a new road cannot now be constructed.

The relator in that case was organized under the general laws of New York and received a franchise

from the City of New York to construct a street railway. It seems that the company went ahead and constructed a horse street railway.

The Supreme Court of New York held,—*First,* that a cable line was not within the contemplation of the franchise granted by the city; *Second,* that a cable line was prohibited by a provision in the franchise, to the effect that steam power should not be used on any part of the road for propelling cars; and, *Third,* because the company had exhausted its power to construct a line when, in compliance with the franchise, it constructed a *horse* street railway line.

This case was affirmed by the Court of Appeals on February 8, 1889. (See 19 N. E. Rep., page 831).

In the opinion on the appeal, the Court said:

> "The terms of the grant conferring the right which is asserted are to be strictly construed and the privileges it confers cannot be extended by inference. If there is any ambiguity it must operate against the company; the general rule being that the grant shall be construed most strongly against the party claiming under it, and every reasonable doubt resolved adversely to it. Nothing is to be taken as conceded but what is given in unmistakable terms; and, as we have said in *Langdon v. Mayor*, 93 N. Y., 145, whatever is not unequivocally granted, is deemed to be withheld,' nothing passing by implication. The affirmative must be shown. The Court is not to search for any hidden meaning."

The franchise which was granted by the City of New York is not set out in full in either opinion,

but enough of it appears to show that it is, in all substantial particulars, like the one in the case at bar.

The company was authorized to lay a double track for a railroad in certain streets in the City of New York upon certain conditions, to-wit, as to the repair of the space between the tracks and the space between the railroad and each side of the street and as to the rail to be laid and the portions to be completed, etc. There was also a further condition to the effect that no steam power should be used on any part of the road for propelling cars.

It appears that immediately after the granting of this franchise by the City of New York, the company went ahead and complied with the conditions, and laid its rails in accordance with the terms of the franchise, and adopted a system of traction by horses, and thus operated its line up to the time when the action was commenced.

The Court of Appeals held, (somewhat amplifying the argument of the Supreme Court in the same case) that, having laid its track and adopted its system, it had no power to adopt and put into use any other motive power than the one originally adopted; that its franchise was, to that extent, exhausted.

In the case of *North Chicago City Railway v. Town of Lakeview*, 105 Ill. Rep. page 207, the Supreme Court of Illinois went further than the Appellant's contention in this case. In that case, the plaintiff was authorized to maintain and operate a street railway along and over a particular street.

The charter was silent as to the character of the power to be used in propelling the company's cars. It was maintained, therefore, that the company had the option for that purpose to select either steam or horse power as it might prefer.

The Court said:

> "We think, in such case, it would be more reasonable to hold the legislature intended the company should use that kind of power in propelling its cars which would be most conducive to the best interests of the public having occasion to use the street as a common high way and which was then in ordinary use in this State. Giving the charter this construction, horse, and not steam, power was clearly intended."

In the case at bar, the franchise is not silent as to the motive power, but *expressly restricts* the complainant to either animal or pneumatic power.

The doctrine of the case of *Stein v. Bienville Water Supply Co.*, 34 Fed. 145, which case is affirmed in 141 U. S. 67, applied to the facts in this case, most conclusively determines the proper construction to be given to the franchise in question.

In that case, the plaintiffs claimed an exclusive grant of the right to supply the City of Mobile with water from any and all sources. The grant, however, authorized them to furnish the City of Mobile with water from *Three-Mile Creek*. The defendant contended that the exclusive grant applied only so far as the supply was drawn from Three-Mile Creek, and that, when it came to supplying the citizens of Mobile with water from any other source, the grant did not apply. The Lower Court said:

> "Nothing is better settled than that statutes creating monopolies, granting franchises and charters of incorporation, must be construed liberally in favor of the public and strictly against the grantee. Monopolies are justly regarded as encroachments upon the natural rights of the people, and are viewed with jealousy by courts."

And again the principle to be applied to the construction of such grants is said to be

> *"that all rights which are asserted against the State must be clearly defined. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and when it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State."*

The point was made in that case, that plaintiff's rights, under its exclusive charter, were being violated by the action of the Alabama legislature in incorporating the Bienville Water Company and authorizing it to supply water to the citizens of Mobile from any other source than that of Three-Mile Creek.

A history of the case, as given in the opinion of the Supreme Court of the United States shows that, from 1820 up to the 26th day of December, 1840, various attempts had been made to secure a water supply for the City of Mobile from Three-Mile Creek; and that, on the latter date, the City of Mobile and Albert Stein, the administrator of the plaintiff, entered into an agreement whereby the

city granted to him and his heirs, executors, administrators and assigns, "the sole privilege of supplying the City of Mobile with water from Three-Mile Creek for twenty years from the date of this agreement," etc.; and then followed certain provisions as to Stein having all the advantages and benefits which had formerly accrued to the mayor, aldermen and common council under a special act of the legislature passed December 20, 1820, and all subsequent ordinances, resolutions and all acts amendatory thereto. The city covenanted at the expiration of the term to buy the water works. This agreement between Stein and the City of Mobile was confirmed by an act of the legislature on January 7, 1841; and all the rights, privileges and immunities granted by acts of December 20, 1820 and 1837 were granted and confirmed to said Stein. The case shows that Stein built and operated the works for many years. The defendant company was incorporated by an act of the legislature of February 19, 1883, which act was amended by act of February 14, 1885, and was authorized to furnish a supply of water for Mobile and other surrounding towns.

By Section 10 of the act, an exclusive right of conducting water from any source other than Three-Mile Creek into the County of Mobile, for the period of twenty years, was given to the defendant.

Mr. Justice Harlan, writing the opinion, after observing that the case under consideration was materially different from those exclusive grants for furnishing water from any and all sources said:

> "The exclusive right acquired by Stein, under his contract of 1840, with the City of Mobile, and confirmed by the act of January 7, 1841, of supplying that city and its people with water, by means of a system of public works, did not, *in terms or by necessary implication*, embrace all streams, or rivers or bodies of water, from which he could supply water for public use in Mobile. While the obtaining of water for that city was undoubtedly contemplated by the legislature when it passed the first act, that of 1820, the thing done to that end was to incorporate certain persons proposing to bring water to the city from Three-Mile Creek or Bayou Chatogue."

The Court further said:

> "Why the parties in making their agreement specified a particular stream from which Stein was to conduct water into the city of Mobile for public use does not distinctly appear. And it is not necessary to inquire, for the question before us depends upon the fair and reasonable interpretation of the agreement actually made. The Court has no right to enlarge it, even if it believed that the parties themselves would have done so, if the matter had, at the time the agreement was signed, been called to their attention. The exclusive privilege granted, and the power and authority conferred in connection therewith, were to conduct water into the city from Three-Mile Creek. The parties by the agreement, fixed upon that stream as the source of the water to be brought into the city, and the exclusive privilege granted to Stein had reference only to that stream."

It seems to us that this case leaves little to be said against the contention of the complainant here that what it obtained by its franchise of 1875 from the City of Minneapolis was, the right to construct

and operate street railways, without reference to the motive power to be used.

In the case of *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep., page 529, it was held by the Circuit Court, Eastern District of Michigan, that the exclusive right to light a city with gas for thirty years, was not, within the meaning of the constitution, impaired by a subsequent contract between the city and another company to light the streets with electricity. In that case, the plaintiff was granted by the City of Saginaw, in April, 1868, the exclusive right and privilege of erecting, maintaining, and continuing and operating gas works within said city, and the exclusive right and privilege of manufacturing gas in said city for lights, and of selling the same and of supplying the inhabitants of said city, etc.

By subsequent ordinances, the city contracted for the lighting of its streets with gas. The contention of the plaintiff, which applied for an injunction against the city's entering into any contract to light its streets with electricity, was that, the *substance* of the grant must be regarded, and that the substance of it was to *light the streets*, or rather, that it was a *lighting franchise*, and that gas was merely used as incidental to that. In other words, its claim was that, it had an *exclusive franchise to light*, unhampered in any respect by the use of the word "gas" in connection therewith.

The Court, however, held otherwise and denied the injunction. It said:

> "It is not the exclusive privilege of lighting the city, but of lighting it with gas, that is contemplated. There is nothing to prevent the city from using oil, electricity, or any other means of illumination, except gas. At the same time this ordinance was passed the employment of gas was the favorite and only effectual means of lighting a city, and it was undoubtedly supposed by both parties that it would continue to be so. But in the progress of human science another method has been invented, which bids fair to supersede the old one, and the city may well claim that it ought not to be deprived of the benefits of the latest discoveries in that direction."

Here it is the claim of the complainant that, by the original Ordinance of 1875, confirmed by the act of the legislature of 1879, it became invested with the general and absolute power and authority to construct and operate a *street railway line.* This, we think, is obviously utenable. The ordinance of 1875, purports to confer an *exclusive privilege;* and the authorities are all one way to the effect that, such exclusive privileges are to be strictly construed. Nothing is to be taken by implication. If there is any doubt or ambiguity involved in the grant, it must be resolved against the grantee. Whatever is claimed, under the grant of an exclusive privilege, must be found in the letter of the grant. Things convenient or in view of a subsequent stage of the art or science *necessary,* do not pass.

All the arguments used by the learned counsel, at the hearing in the Lower Court, to substantiate the claim of the Complainant that what it was granted was, the right to operate a *street railway,*

have been answered time and again by the decisions in the cases we have cited.

All that the Complainant obtained by the ordinance of July 9, 1875, was, the right to construct and operate an *animal* or *pneumatic* street railway. The grant contained in Section 1 is expressly made "subject to the terms, conditions and forfeitures hereinafter contained," while the act of March 4, 1879, Chapter 299, expressly provides that the right to construct and maintain said street railway through the streets of said Minneapolis, with the rights and privileges as set forth and *qualified* in said ordinance, is legalized and granted to said company.

Here it is perfectly plain that what the legislature of Minnesota legalized and confirmed was, the right to operate a street railway, operated by animal or pneumatic power. The rights and privileges set forth in the original ordinance of July 9, 1875, as qualified therein, mean precisely this and no more.

It is a matter of common knowledge, at least in Minneapolis, that several years prior to 1890, propositions were being made by other companies for the installation of electric street railways. No one scarcely contended at that time that the City of Minneapolis did not have the absolute right to permit another company to construct and operate either a cable or an electric street railway in the streets of Minneapolis.

In 1888, the City Council came within one vote of passing an ordinance permitting another com-

pany to so construct, and operate an electric street railway. Such a permit (and the City of Minneapolis, without authority from the legislature, could give no more than a permit) would not violate the exclusive rights and privileges granted by the ordinance of July 9, 1875.

There was in the City and the State, undoubtedly, the reserved right to authorize the construction and operation by another company of an electric street railway. In view of the advance in the art of street railroading at that time, that reserved right was of great value. The Minneapolis Street Railway Company was operating an inadequate and obsolete horse railway system. It had no right to operate upon the streets of Minneapolis with anything else than animal or pneumatic power. Its franchise then was of little practical value. It could not install either a cable or electric system without authority from the City or State. In order to modernize its lines it had to ask authority for reconstruction of its roadbed and rails and the installation of a complete electric system. This necessarily involved discarding the old rails and ties, horses and cars. It required in the streets a heavier roadbed and larger rails and placing in the streets iron and wooden posts on which to carry the electric wires. It also required putting into use entirely new and different cars.

It was when the old horse street railway line was in this condition that the ordinance of September 19, 1890, *was passed, and it is under that ordinance, unconfirmed by any act of the legislature,*

that this complainant is now operating its electric street railway line.

Complainant's counsel contended in the Lower Court that it received no "grant from the City of Minneapolis by the ordinance of September 19, 1890. Technically speaking, this, of course, is correct. It did, however, receive a *permit,* which was all that the City of Minneapolis could give. The only reason why the ordinance of September 19, 1890, is not a contract is, because the City of Minneapolis lacked the power to enter into a contract.

The ordinance of September 19, 1890, is entitled *"An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity."*

By the Charter of Minneapolis, chapter 4, Section 8, it is provided as follows:

> "The style of all ordinances shall be 'The City Council of the City of Minneapolis do ordain.' The subject of every ordinance shall be expressed in its title, and no ordinance shall embrace more than one subject."

In legal effect, the title to the ordinance of September 19, 1890, is precisely the same as the title to the ordinance of July 9, 1875, to-wit: "An ordinance authorizing and regulating street railways in the City of Minneapolis."

It must be borne in mind that what the Appellee is contending for here is, that it has a contract with the City of Minneapolis with reference to its operation of an *electric street railway* line; and the pertinent question arises,—what is the evidence of

that contract. The ordinance of July 9, 1875, as confirmed by the legislature, relates only to a *horse or pneumatic street railway.* That railway has become obsolete and been wholly discarded. That ordinance is not involved in the later ordinance of September 19, 1890, except only as it is referred to in Section 8 thereof.

This ordinance of September 19, 1890, is, and in fact purports to be, an independent authorization of the Minneapolis Street Railway Company to construct and operate an *electric* street railway line. If it were not for Section 8, there would be absolutely nothing in the entire ordinance referring to the previous ordinance of July 9, 1875. We must look, therefore, to the language of Section 8 to see how far any of the provisions of the prior ordinance are incorporated into the later one. It is only because in the original ordinance of 1875 that the City binds itself not to reduce the passengers fare *below* five cents over *one continuous line* and not to designate *any line as continuous which exceeds three miles in length*, that it can be claimed there was a contract as to horse cars. The question immediately arises, is the promise or obligation on the part of the City in any way brought forward and incorporated into the ordinance of September 19, 1890, so as to be binding as to electric cars.

One thing is absolutely certain, and that is, that if that promise or obligation is not contained by necessary implication in the language of Section 8, it is not in the ordinance at all. The language of Section 8 is as follows:

> "In the construction, maintenance and operation of said line of street railway said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled, 'An Ordinance authorizing and regulating street railways in the City of Minneapolis' passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable."

It will be noticed that this section does not purport to impose any promise or obligation upon the City of Minneapolis. It is only the *Minneapolis Street Railway Company* that is made *subject* to anything.

When we examine the ordinance of July 9th, 1875, we find many terms and limitations imposed upon the Street Railway Company and many provisions imposing duties and obligations upon it. In fact, in the argument upon the hearing in the Lower Court, upon the point made by Appellant that there was a reserved power in the City of Minneapolis under the terms of said Section 8 to pass the ordinance of February 9, 1907 (the one complained of here) Complainant's counsel stoutly maintained, and the Lower Court held with them, that the language of that section 'in the construction, maintenance and operation of said lines of street railway." had no reference whatever to the rate of fare, and that, consequently, whatever power was reserved to the city therein, did not relate to such rate of fare. The language of the learned Judge of the Lower

Court is specific and emphatic upon this point. (See page 132, Transcript of Record). We quote from the decision of the Lower Court. Referring to the reserved power contained in said Section 8, the Court said:

> "Now, it does not seem to me that this touches the rates of fare at all. It says 'in respect to construction,'—that is not fare. 'Maintenance'—that is not fare. 'And operation,' that is, how the cars shall be run and what shall be done in respect to that by the street railway company. The company shall be bound by the provisions of this original ordinance and other ordinances amendatory thereof, and all other ordinances of said city 'now in force, or hereafter adopted, so far as applicable."

The learned Judge then proceeds to point out that this section simply provides that the *Minneapolis Street Railway Company* shall be bound by certain rules and regulations contained in the original ordinance and in subsequent ordinances and in ordinances to be passed by the City with reference to the construction, maintenance and operation,—holding that these three words have nothing whatever to do with the rate of fare.

According, then, to both the contention of Complainant's counsel and the decision of the Lower Court, there is absolutely nothing whatever in the ordinance of September 19, 1890, relating to the matter of fare. So far then as the point we are discussing is concerned, the case stands precisely the same as though the ordinance of September 19, 1890, which is, and purports to be, an independent ordinance, did not contain Section 8 at all.

The Minneapolis Street Railway Company received under this ordinance no other or greater rights to construct, maintain and operate an electric street railway than the City of Minneapolis could have given by a similar ordinance to another company. This, it seems to us, is too clear to admit of doubt.

The Minneapolis Street Railway Company got something to which it was not entitled as a matter of right by reason of the ordinance of July 9, 1875. The City of Minneapolis could have granted this permit or right or privilege to another corporation without infringing upon, or violating the terms of, the original ordinance of July 9, 1875.

The Minneapolis Street Railway Company must, therefore, take what it received under that ordinance, precisely the same as *any other* company might have received it.

As the ordinance of July 9, 1875, is not incorporated into the later ordinance, except so far as it may be incorporated by express terms, and as (according to the claim of Complainant's counsel and the decision of the Lower Court) Section 8 does not, to any extent, touch upon the matter of fare, then the gist of the former ordinance, so far as this case is concerned, is eliminated from the later one. If, however, Complainant's counsel and the Lower Court have taken too narrow a view of the language of Section 8, and if the proper construction of that language is that, the words "in the construction, maintenance and operation of said lines of street railway" should cover everything relating

to the electric street railway, including the rate of fare to be charged thereon, then we have a case where the Minneapolis Street Railway Company alone is made subject to the terms, limitations and provisions of the original ordinance, without any promise or obligation of any sort being imposed upon the city.

The authorities are generally to the effect that promises or obligations on behalf of municipalities are not to be spelled out by inference from the language of ordinances.

In the case of *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, this Court held that a provision in a contract to the effect that "said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons" did not impose any obligation upon the City of Knoxville not to reduce the rate of charge below five cents per one hundred gallons.

The Court said:

> "The contract contained three distinct parts, first, the promises of the company; next, those of the city; and last, the mutual undertakings. In the first part the company undertook as follows: 'Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons,' subject to an immaterial proviso. These are the words relied on by the company. *They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.*"

So in the case at bar; if the words "construction, maintenance and operation," as used in Section 8, Ordinance of September 19, 1890, be construed to apply to everything, including the rate of fare, still as in the *Knoxville* case, the obligation imposed is wholly upon the *Minneapolis Street Railway Company.*

What the Appellee is relying upon in this case is, the last clause of Section 8 in the original ordinance of July 9, 1875, which is as follows:

> "The City shall not reduce the passenger's fare below five cents, over any one continuous line, and what shall be considered a continuous line may be designated by the City Council of the said city, but that said Council shall not designate any such continuous line to be more than three miles in length."

We think it is perfectly clear that this obligation is in no manner incorporated into the Ordinance of September 19, 1890.

In the *Knoxville* case just cited (See page 436) this Court said:

> "The trouble at the bottom of the company's case is that the *supposed promise of the city on which it is founded does not exist.* If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements." Citing *Georgia Railroad & Banking Co. v. Smith*, 128 U. S., 174; *Regan v. Aiken*, 9 Lea., 609.

It will be seen that in the case at bar, precisely as in the *Knoxville* case, the supposed promise of the City of Minneapolis not to reduce the rate of fare below five cents for one continuous ride of not exceeding three miles in length with reference to *electric street railways, upon which the whole of Appellee's case rests* does *not*, in fact, exist.

In the case at bar, just as in the *Knoxville* case, it may be said that if such a promise or obligation had been intended on the part of the city, "it was far too important to be left to implication."

It is undoubtedly true that the Minneapolis Street Railway Company secured in this ordinance all that it was possible for it to secure. If anything was left to inference or implication, it was undoubtedly so left because it could not secure the same in express language. Public service corporations are usualy more ably represented in the matter of these franchises, than are the people. It is only fair to suppose that, if the City had intended to be bound by the obsolete provisions of Section 8 of the original ordinance of 1875, some language appropriate to express that meaning would undoubtedly have been used.

In 1875, as before stated, the City of Minneapolis, had a total area of 11 1-4 square miles, while on September 19, 1890, it had an area of 52 square miles (See pages 45 and 46, Transcript of Record).

In 1875, when the original ordinance was passed, the total population of the city was 33,700. In 1890, when the electric ordinance was passed, the

population was 164,738. (See page 46, Transcript of Record).

Under these circumstances, is it to be supposed that the members of the City Council intended the provisions of the last clause of Section 8 of the Ordinance of July 9, 1875, to apply to the new *electric* line?

In 1875, a line three miles in length would almost cross the city in any direction; while in 1890, the distance between the northwestern and southeastern limits of the city exceeded nine miles. In 1890, nearly every line then being operated exceeded three miles in length. And at the present time several of them are in the neighborhood of ten miles in length. And yet, according to the complainant's contention and according to the *explicit terms of the judgment in this case,* the complainant cannot be compelled to carry any passenger for less than five cents over any one *continuous line* and the City Council cannot designate as one *continuous line* a line *more than three miles in length.*

The language of the judgment is: "Complainant is entitled to collect five cents from each passenger riding upon its cars *as provided in said ordinance of July* 9, 1875."

Section 8 of that ordinance expressly provides that the fare shall be *five cents for a continuous ride,* and a *continuous* ride shall *not exceed three miles in length.*

Is it to be supposed that this provision, reasonable enough when the City only had a population of a little over thirty-three thousand and an area of

only a little over eleven miles, but wholly *obsolete* and *inadequate* to the needs of a city of over *fifty-two* square miles and a population of over one hundred sixty-four thousand was purposely incorporated into the electric ordinance of 1890?

In the case of *Slidell v. Grandjean*, 111 U. S. 412, 438, this principle of strict construction in reference to municipal grants, which has become axiomatic, is declared to be a wise and salutary doctrine.

The Court said:

> "It serves to defeat any purpose concealed by the skilful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

It is inconceivable that the ordinance of September 19, 1890, could have passed the City Council of Minneapolis had the present contention of Apellee's counsel (sustained by the Lower Court), been stated therein in plain and unambiguous language. Such an express provision, embodying in explicit language the *present bald contention* of counsel, would have been so obviously incongruous, in appropriate and inadequate to the necessities of the traveling public, that its passage would have been impossible.

See *Coosaw Mining Co. v. South Carolina*, 144 U. S., 550, in which it was held that where the provisions of a grant were capable of two constructions, the one more favorable to the State would be adopted.

It was there held that *"only that which is granted in clear and explicit terms passes by a legislative grant of property, franchises or privileges in which the government or the public has an interest."*

In the latter case, the Coosaw Mining Company claimed to have an exclusive right, for an indefinite period, to dig and mine in Coosaw River, and that, in violation of the constitution of the United States, the obligation of its contract had been impaired by a subsequent act of the legislature.

It was held by the Lower Court in that case that, the Coosaw Mining Company at one time did have such exclusive right, but that the period of such exclusive right had expired before the institution of the suit.

The whole question turned upon the construction to be placed upon two acts of the legislature of South Carolina.

In 1870, the State granted to certain persons, whom the Coosaw Mining Company succeeded, the right, for the term of twenty-one years, to dig and mine certain prosphatic deposits in the streams and waters of South Carolina. This grant was made upon the condition that the grantees pay a royalty of one dollar per ton for such phosphatic deposits, and, in addition thereto, a license fee of five hundred dollars.

In 1876, the legislature passed another act upon which the Coosaw Mining Company founded its claim of an exclusive right, for an indefinite period, to dig and mine phosphatic deposits in that part

of the Coosaw River which it was then occupying.

Certain sections of the latter act provided that the Coosaw Mining Company, on accepting the terms of the act within ten days from its passage, should thenceforth "have the exclusive right to occupy and dig, mine and remove phosphate rock and phosphatic deposits from all that part of said Coosaw River above mentioned so long and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove, and ship or otherwise send to market, and punctually pay the royalty thereon, as provided in the first section of this act."

The Appellant accepted the terms of that act as provided therein.

The act, which it was claimed impaired Appellant's contract, was passed on December 23, 1890. This act created a "Board of Phosphate Commissioners," and authorized the said Board to make a royalty of not exceeding two dollars per ton as the charge for all phosphate rock dug or mined in the State. It also authorized and directed the Board, after a certain date, to take possession and control the Coosaw River phosphate territory, which had been occupied by the Coosaw Mining Company, and to issue licenses to mine and remove the rock therefrom.

The Appellant contended that, under the act of 1876, it acquired absolute and exclusive right to dig and mine phosphate in certain parts of the Coosaw River in perpetuity, as long as it complied with the conditions of that act.

The State of South Carolina contended that the exclusive provisions of the act only extended during the remainder of the original term, which expired on March 1, 1891, the original grant of March 1, 1870, being for twenty-one years.

The Court said:

> "Under the latter construction, the right of the appellant, by the acts of 1870 and 1876, to dig, mine and remove phosphate rocks and phosphatic deposits in the navigable waters of the State, ceased altogether after the expiration of twenty-one years from March 1, 1870. If the act of 1876 materially altered that of 1870, in respect to the times and manner of making returns, or the royalty to be paid, the Coosaw Mining Company received in consideration therefor what it did not previously have, that is, an exclusive right, for a limited period, in the particular part of Coosaw River which it occupied when the act of 1876 was passed."

Precisely the same may be said in the case at bar. If the ordinance of 1890 materially altered or failed to bring forward anything contained in the act of 1870, the Minneapolis Street Railway Company received a consideration for such failure and omission in the right and privilege, granted to it by the later ordinance, of constructing and operating an *electric street railway* in place of the old and discarded *horse* street railway.

The Court held in the *Coosaw Mining Company* case that, all doubts must be resolved in favor of the State. This language was used:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchis-

es or privileges in which the government or the public has an interest." Citing the following cases:

Rice v. Railroad Co., 1 Black 358, 380; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666; *Hannibal etc. Railroad v. Missouri River Packet Co.*, 125 U. S. 260, 271; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 49; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 80; *State v. Pacific Guano Co.*, 22 So. Car. 50, 83, 86.

Again the Court said:

> "Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequavocally granted is withheld, *nothing passes by mere implication.*"

The case of *Stanislaus County v. San Joaquin and King's River Canal and Irrigation Company*, 192 U. S., 201, illustrates how strictly courts construe contracts made between public service corporations and municipalities, in favor of the latter.

In that case, the water company was organized under a law which provided as follows:

> "Every company organized as aforesaid shall have power, and the same is hereby granted, * * * to establish, collect and receive rates, water rents or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than *one and one-half* per cent per month upon the capital actually invested."

The Court held that, although the law was a general one, nevertheless a company organizing under it might thus secure the benefits of an inviolable contract. But the Court said:

> "The question then arises whether language such as is contained in the third section of that act" (the one just quoted) "and which is set forth in the foregoing statement of facts, amounts to a contract to be protected by the Constitution of the United States? We think it does not."

This Court held in that case that the terms of the contract were to be literally construed, and thus construed there was no prohibition against the right of the State to reduce the rates itself or to authorize the municipality to reduce them.

It was contended on the part of the water company that the power to regulate rates was delegated by the State to the county, and by the general act, the State had incorporated into the act the proviso that the rate should not be reduced by the supervisors so low as to yield less than one and one-half per cent per month upon the capital actually invested.

According to the scheme of the act, the State had delegated all power to regulate to the county, and then had prohibited the county from reducing the rates below a certain figure. It was argued from this that, the prohibition should be as broad as the delegation, and that the State, having delegated all power to regulate, it would practically be a breach of faith to violate the prohibition which it had laid upon the county.

The Court, however, held against the company and to the effect that the contract must be strictly construed in favor of the municipality, and that, thus construed, there was no prohibition against

the exercise by the State of its sovereign right to regulate rates.

Furthermore, the Court held that the language of the act of 1862 did not, and was not intended to form a contract; but simply declared the *then* pleasure and intention of the legislature which would continue until subsequently altered by it. Citing a large number of cases to that effect, and among the number, the case of *Owensboro v. Owensboro Waterworks Company,* 191 U. S. 358.

In *Home Telephone Co. v. City of Los Angeles,* 211 U. S. Rep. page 265, it was held that even where the State had delegated to the municipality power to fix and determine rates, such delegation of power would not authorize the municipality to enter into an irrevocable contract as to rates for the entire period of the franchise.

This Court held that the rate-making power was a legislative one, and that nothing but a legislative function was granted.

In discussing this case, the Court reiterated the doctrine which has been many times announced, that, "while the State may authorize its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation for a definite time," yet such delegated authority will be strictly construed, and the right to make an inviolable contract will not arise except from express and explicit language to that effect.

The Bill of Complaint in this case is framed solely upon the theory that complainant's contract with reference to the operation of an *electric street rail-*

way has been impaired or that impairment thereof is threatened.

It is, as before stated, incumbent upon the Appellee to show that it has a contract with reference to an *electric* street railway, and that the provision with reference to the rate of fare applies to the *electric* street railway. It is not enough that complainant had (or even has) a contract with reference to a *horse* street railway or a *pneumatic* street railway. That kind of a street railway was abandoned nearly twenty years ago.

If complainant is operating under the ordinance of September 19, 1890, then there is obviously no contract, for the City of Minneapolis was then, and always has been, without authority to enter into a contract with the complainant. And even if the ordinance of September 19, 1890, with reference to the electric street railway could be treated as a contract, still there is absolutely no provision in that ordinance with reference to the rate of fare.

Unless Section 8 thereof brings forward all the provisions of the ordinance of July 9, 1875, (and even if that be true *only the Minneapolis Street Railway Company* is made *subject* to those provisions) there is nothing upon which to predicate (even by implication) a promise that the City will not reduce the rate of fare below five cents with reference to *electric* street railways. And still further, if the provisions of Section 8, Ordinance of September 19, 1890, be held to relate to the *provisions with reference to rate of fare in the old or-*

dinance of July 9, 1875, then there is clearly the reserved power in the City to modify that rate by subsequent ordinance.

Several cases have arisen where two or more corporations have been consolidated or merged into one under legislative sanction. Interesting questions have arisen by reason of such mergers or consolidation.

In the case of *The Peoples Gaslight & Coke Co. v. Chicago,* 194 U. S., page 1, it was held that a special statutory exemption does not pass to a new corporation which succeeds others by consolidation or purchase, in the absence of *express direction to that effect,* and that this rule is equally applicable to a case where several companies are held and operated by *one* of them under authority of the legislature.

In that case, one of the constituent companies, it was claimed, had a contract with the State that the City of Chicago should not be allowed to reduce the price of gas below three dollars per one thousand feet. It was further claimed that, inasmuch as the consolidation or merger was especially authorized by act of the legislature, this contract with the State inured to the benefit of the consolidated company. The Lower Court held that it was not so extended, and that, inasmuch as the Bill in that case was with respect to the entire plants as consolidated, it could not be sustained, because there was no such contract as to the whole system which the ordinance impaired.

This Court held that it was clearly a case where partial relief should not be granted, for the obvious reason that the Bill of Complaint was not framed for that purpose. But the Court went further and held expressly that the alleged exemption from reduction in price was not extended by the act of 1897 to the consolidated company.

The Court said:

> "Prior to that time (1897) the operations of the People's Company were practically confined to the west division of the city, and although it was empowered to lay pipes in any of the streets or avenues, this was only with the city's consent. The city in 1858 authorized the company to do this, but this was 'subject at all times' to the city's resolutions and ordinances."

And further:

> "It is true that after the acquisition of the other companies the city compromised with the People's Company in respect of claims for gas furnished, and also ordered the company to lay mains in streets which formerly did not have them, but this action was not equivalent to consent to the extension of the alleged restriction on rates to territory acquired under the merger, with the accomplishment of which the city had nothing to do."

It will be seen that in the case just cited, there was an attempt on the part of the gas company to extend the restrictions of the original contract to subsequent territory in which it, by consent of the city, laid mains.

This claim on the part of the company was denied by this Court. In effect, that is precisely what

is being claimed here by the complainant. It had a contract right, under the original ordinance of July 9, 1875, confirmed by subsequent act of the legislature, with reference to the construction and operation of a *horse* street railway line. Its contract with the city was binding because the legislature of the State confirmed it in 1879.

By the acceptance, on behalf of the complainant, of an ordinance passed September 19, 1890, (*without confirmation by the legislature*), the complainant claims to have a contract right with reference to *rate* on its present *electric street railway line.* As before stated, it does not have any contract with reference to an electric street railway line, in terms. If Section 8 in the later ordinance does not apply to rates, then there is nothing whatever in the ordinance touching rates, *even as a matter of form.*

Somehow or other, (counsel insist) and just how has never been made clear, the restriction as to rate of fare in the original ordinance of July 9, 1875, is brought forward into the ordinance of September 9, 1890.

As before stated, the ordinance of 1890, is a *separate* and *independent* one. It does not purport to be an *amendment* of the old ordinance or supplementary thereto.

Complainant's counsel have studiously made it appear, by the Bill of Complaint, that the complainant is operating its present line by virtue of the original ordinance of 1875, the experimental resolutions of 1899, and the final ordinance of Sep-

tember 19, 1890, which is generally referred to as the "electric ordinance."

Under which ordinance is the complainant operating?

Is there one main ordinance to which all others are merely incidental? And, if so, which is the main ordinance?

By some means or other, the restriction as to fare, must, in order that complainant's contention may be sustained, be extended to the *electric* ordinance of September 19, 1890.

In the case to which we have just called the attention of the Court, it was said (citing a large number of cases) that, as a general rule a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. And the Court added:

> "The same rule is applicable where the constituent companies are merely *owned* and *operated* by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So that the act of 1897 cannot be construed as extending any prior immunity the acquiring company possessed over the whole system of all the companies consolidated."

In *The People's Gas Light & Coke Co., supra*, the case of *Minneapolis & St. Louis Ry. Co. v. Gardner*, 177 U. S. 332 was cited. There, by the act of the legislature of Minnesota, Chapter 113, Laws of

1881, the consolidation of several railroad companies was authorized, and upon the new corporation thus authorized, the legislature conferred the franchises, exemptions and immunities of the constituent companies.

The companies constituting the consolidated company thus authorized by the laws of 1881 were, the Minnesota Western Railway (in 1870 changed to Minneapolis & St. Louis Ry. Co.), the Minneapolis and Duluth Railroad Company, the Minnesota and Iowa Railroad Company, and the Fort Dodge and Fort Ridgely Railroad Company.

The Minneapolis and Duluth Railroad Company was a Minnesota corporation, and the Fort Dodge and Fort Ridgely Railroad Company and the Minnesota and Iowa Southern Railroad Company were Iowa corporations; and the laws of the State of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts, by embodying in the articles of incorporation an article or provision declaring the exemption. As to the Iowa corporations, this had been done.

There was, therefore, as to the Iowa corporations, a complete exemption from stockholders' liability.

It also appears that the Minnesota Western Railway Company was organized under a special act of the legislature of Minnesota in 1853, and that there was no stockholders' libility under that act. It was argued that, inasmuch as there was no personal liability of stockholders in any of the constituent companies, and inasmuch as the legislature granted to

the consolidated company all the franchises, exemptions and immunities of the constituent companies, there would be no stockholders' liability in the consolidated company.

The argument was two-fold: *First,* the new company is but an extension of the lives of the old companies, and is, in fact, identical with the old companies; and, *Second,* whether the new company be identical with the old or not, the State of Minnesota could legally transfer all existing *franchises, immunities and exemptions* of the old corporations to the new corporation, althought it could not grant new franchises of the same class to such new corporation. This Court held, however, that the consolidated company was, in fact, a new corporation.

It was held that this case could not be distinguished from the case of *Shields v. Ohio,* 95 U. S., 319. There the claim of the new company to the exemptions of the constituent companies, was denied. In the latter case the Court said:

> "It," (the new company) "did not acquire anything by mere transmission. It took everything by creation and the language was brief and it was made operative by inference; but this did not affect the legal result."

In the *Minneapolis & St. Louis Ry. Co.* case, *supra,* this Court said:

> "But we do mean to say that in a State having a constitutional provision imposing liability on stockholders, if the legislature intended that those of a new corporation created by it should be exempt it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation."

And again:

> "In other words, we hold that the legislature did not intend by the act of 1881 to give immunity to the stockholders of new corporation from the liability imposed by the constitution of the State."

There is still another case in this Court to like effect,—*Covington and Lexington Turnpike Road Company v. Sanford*, 164 U. S., 578.

In that case, the Turnpike Company was incorporated under an act of Kentucky, approved February 22, 1834. By the act, the company was authorized to collect certain specified tolls, which, after the expiration of five years, the legislature might reduce, provided the tolls so reduced would produce net dividends of fourteen per cent.

In 1839, an act amendatory of the act of 1834 was passed providing for a divided control of the road. In 1851 another amendment was passed. Under the amendments, two independent companies were organized to operate the turnpike; the act providing that each company should *possess* and *retain all the powers, rights and capacities* in severalty granted by the act of incorporation and the amendments thereto to the original company, and should be subject to all the restrictions imposed upon the original company.

It was claimed that this language embraced or carried into the incorporation of the two campanies created by the act, the immunity or exemption given by the original act of 1834 from legislation that would preclude the company from earning as much as fourteen per cent on its capital stock.

It was conceded that the original corporation organized under act of 1834 was entitled to that exemption or immunity. The two corporations which were organized under the acts of 1834 and 1851 succeeded to the original corporation. And to the two corporations, there was expressly granted by the act of 1851, all the powers, rights and capacities to which the original company was entitled under the act of 1834.

The question, therefore, was squarely presented, unhampered by other considerations than those stated; were the two succeeding companies entitled to the exemption with reference to rates? This Court held that they were not, and affirmed the judgment of the Court of Appeals of Kentucky.

It was observed in that case that all exemptions by the State or by its instrumentalities are in dero gation of common right and sovereign authority, and are never to be extended beyond the exact and express requirements of the grant, construed *strictissimi juris.* Citing several cases.

The question here is not whether a five cent fare is reasonable or unreasonable. We are not concerned with whether a continuous ride restricted to three miles is reasonable or unreasonable. It is simply a question of *absolute contract right.* The whole case of the complainant is based upon an alleged contract. The contract, if it exists, is single and relates to *the rate of fare for a continuous ride, which continuous ride is restricted to not exceeding three miles in length.*

That absolute provision was in the ordinance of July 9, 1875. That provision, as a contract, is now about to be violated by the ordinance of 1907 (as claimed by counsel and decided by the Lower Court), when the complainant is operating an *electric street* railway in a city containing fifty-two square miles and a population of about three hundred thousand, and when conditions between 1875 and 1890 had so materially changed, not only in the methods of conveyance, but as to the size of Minneapolis in area and population, as to make the provisions of the ordinance of 1875 a practical straight jacket. The ordinance of September 19, 1890, must, therefore, be construed in the light of conditions existing at the time of its passage.

Restrictions as to rate of fare and as to the length of one continuous ride might be entirely reasonable and advantageous to the public in 1875 as conditions then were; and wholly unreasonable and disadvantageous to the public as conditions were in 1890.

The doctrine which has been so emphatically stated by this Court in the cases cited with reference to the general exemptions, was held in the *Covington and Lexington Turnpike* case, *supra*, to apply to the fullest extent to those cases where contracts were relied upon with reference to the establishment of rates.

The Court said:

> "It is of the highest importance that such control" (over rate) "should remain with the State, and it should never be implied that the

> legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of 'the powers, rights and capacities' granted to the corporation in 1834, the legislature intended to exempt the new corporations, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful work of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a State, relating to the exercise of franchises, is susceptible of two meanings, 'the one restricting and the other extending the power of a corporation, that construction is to be adopted which works the least harm to the State."

Thus far in our discussion upon this point, we have referred only to the ordinance of July 9, 1875. Inasmuch, however, as some stress is placed upon the ordinance of July 3, 1878, and as amended July 8, 1878 (See pages 8 and 9, Transcript of Record) by the learned Judge of the Lower Court, (See decision pages 130, 131 and 132, Transcript of Rec-

ord) we desire to here call attention to this later ordinance.

It will be noticed that by the special act of the legislature, Chapter 299, for the year 1879 (See page 9, Transcript of Record), it was the ordinances of July 9, 1875 and of July 3, 1878, as amended by the ordinance of July 8, 1878, that were confirmed.

The title to the ordinance of July 3, 1878, just referred to, is as follows: "An Ordinance authorizing the Minneapolis Street Railway Company to construct a street railway on certain streets and avenues of the City of Minneapolis."

This is known as the West Side Motor Line, and is so referred to in the Compilation of Ordinances of 1872 and 1905. This ordinance authorizes the construction and maintenance of a line of street railway, commencing at the junction of Nicollet Avenue and First Street, and running up on First Avenue South to Thirteenth Street; thence up Thirteenth Street to Nicollet Avenue; and thence up Nicollet Avenue to the southern limits of the City.

It also authorizes the Minneapolis Street Railway Company to operate this line with animals, steam or other power.

(The amendment is not material, inasmuch as it merely touches the description of the line.) It provides that the City Council may prohibit the use of steam upon any part of said line whenever it shall deem best to do so.

There is a provision also that that line of street railway should be completed in one year from the first of July, 1878.

Section 2 of that ordinance reads as follows:

> "That the Minneapolis Street Railway Company, its successors and assigns, in the construction, maintenance and operation of said lines of street railway, shall, at all times, be subject to all the conditions, limitations and other provisions of an ordinance of said City, entitled "An Ordinance authorizing and regulating street railways in the City of Minneapolis," passed July 9, 1875; and the City Council and City Government shall have all powers respecting said street railway company which it retained under the provisions of said ordinance with reference to the lines of street railway mentioned therein."

This ordinance is referred to by the learned Judge of the Lower Court because it authorizes the operation of cars upon these lines with animal, steam or other power. It seems to us that this ordinance has no significance whatever so far as this case is concerned, inasmuch as it is specifically limited to *one* line of about three miles in length or a little less.

Even if it were to be conceded that, as to this line the Minneapolis Street Railway Company had an absolute right to use animal, steam or other power, including electricity, it certainly would not help the Appellee's case as to its *entire electric* railway system in the City of Minneapolis.

It is somewhat difficult to understand the reasoning of the learned Judge of the Lower Court as it appears on page 131 of the Transcript of Record touching the effect of this ordinance of 1878. The most that can be said, as we understand this ordinance, is that, the City Council undertook to au-

thorize the use of animal, steam or other power upon a specified line and to the extent of the power thus assumed, its act was validated by the legislature of 1879. But how it can be claimed that this in any way affects the general railway system as authorized by the ordinance of July 9, 1875, we cannot understand. Nor do we think the point is made clear by the reasoning of the learned Judge of the Lower Court.

It is said by the learned Judge of the Lower Court that this subsequent action of the City Council in 1878, shows that it was contemplated that the City Council might authorize other motive power than animal or pneumatic. Conceding, for the sake of the argument, that the City Council did so contemplate, this cannot in any manner affect the *power* of the City Council to enter into a contract; nor can it possibly affect any other line or lines than the one specifically mentioned, to-wit, the First Avenue line, which is commonly known as the "motor line."

We think, therefore, we are fully justified in dismissing from this discussion, any further consideration of the ordinance of July 3, 1878, as amended on July 8, 1878.

It will be noticed that by Section 8, Ordinance of September 9, 1890 (Pages 19, 20 and 21, Transcript of Record) it is provided that the "Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions, limitations and other provisions of an ordinance entitled, "An Ordinance authorizing and

regulating street railways in the City of Minneapolis," passed July 9, 1875, as the same has been amended and is now in force, and all ordinances of said city in force or hereafter adopted *so far as applicable.*"

The words "so far as applicable" are held by the Lower Court to be a limitation upon such rules and regulations as are contained in the original ordinance and in the amendments thereof and which may be contained in subsequent ordinances passed by the City Council,—in other words, such rules and regulations as the City of Minneapolis might make, with reference to the operation of street railway lines *in the exercise of its police power.* But the learned Judge of the Lower Court (See page 133, Transcript of Record) says that such reservation, by no reasonable or fair or honest construction, could be held to relate to the original contract in respect to fares. The latter, he says, "was too important a matter."

The pertinent question immediately arises, upon an examination of the original ordinance of July 9, 1875, the ordinance of July 3, 1878, and the electric ordinance of September 9, 1890, as to the exact status of the Minneapolis Street Railway Company after the passage of the last mentioned ordinance. Was the Minneapolis Street Railway Company granted a *franchise* for a definite period, to-wit, for fifty years from July 1, 1873, by the ordinance of July 3, 1878? Nothing whatever is said in the ordinance of July 3, 1878, as to the term of that franchise. It is not an amendment and does not

purpose to be an amendment of the original ordinance of July 9, 1875. The only reference to that ordinance is contained in Section 2; and this we submit has no relation whatever to the *term* of the ordinance.

Precisely the same question arises under the ordinance of September 19, 1890. This ordinance is not an amendment to the ordinance of July 9, 1875, nor does it purport to be an amendment. No reference whatever is made to the original ordinance of July 9, 1875, *except in Section 8.* For what *term* then is the Minneapolis Street Railway Company authorized to construct, maintain and operate an *electric street railway system*, assuming, for the sake of the argument, that the City Council had authority to authorize the Minneapolis Street Railway Company to so construct, maintain and operate such a line for any *definite period?*

The further question also arises, were exclusive privileges granted or authorized by the ordinance of July 3, 1878, or the ordinance of September 19, 1890?

Several resolutions of the Minneapolis City Council were passed in the years 1889 and 1890, prior to the ordinance of September 19, 1890, authorizing experimental electric lines. It is not claimed, and cannot be claimed, that any of these resolutions are in any respect material to this controversy. They authorized experiments in electric lines and were all superseded by the ordinance of September 19, 1890.

It will be noticed that, in the resolution of July 19, 1889, whereby the Minneapolis Street Railway Company was authorized to construct an experimental electric line, it was expressly provided that "nothing in these resolutions contained shall be considered as granting to said Minneapolis Street Railway Company, any exclusive privilege or franchise not heretofore possessed by it."

It is alleged in the Bill of Complaint, and it is undisputed, that, the complainant is operating its electric street railway under the Ordinance of September 19, 1890, and under the Ordinance of July 9, 1875, as amended so far as applicable.

We conclude the argument upon this point by summarizing our contentions as follows:

(a) A *horse street railway* and an *electric street railway* are two *separate* and *distinct* things.

(b) The ordinance of July 9, 1875, as confirmed by the legislature, granted to the Appellee the right for the term of thirty (or fifty) years, to construct and operate a horse or pneumatic power street railway and nothing else.

(c) There was reserved to the City and to the State full power and authority to grant to any other corporation, the right to construct and operate an *electric street railway*. And such a grant to such other corporation would not *impair* or *violate* the grant to this complainant.

(d) By the ordinance of September 19, 1890, this Appellee obtained from the City whatever right

the City could have granted to another corporation to operate an electric street railway, and no more.

(e) After the confirmation by the legislature in 1879 of the Ordinance of July 9, 1875, the City of Minneapolis was powerless to make a contract with the Appellee or to amend in a *material matter, the terms of the original contract.*

(f) The ordinance of September 19, 1890, is a separate and independent ordinance and not an amendment of the Ordinance of July 9, 1875. It confers no rights, powers, privileges or immunities upon this complainant, except such as are contained in express and explicit terms.

(g) If Section 8 of the Ordinance of September 19, 1890, does not (as contended by complainant's counsel and as held by the Lower Court) touch or affect the provisions of the previous ordinance in relation to *rate of fare* and *length of ride*, then there is absolutely nothing in the Ordinance of September 19, 1890, touching those subjects, and, consequently, there can be no contract with reference to the rate of fare.

(h) If, however, Section 8 may properly be regarded as including everything contained in the previous ordinance "so far as applicable," then it is clear that there is no contract on the part of the City not to reduce the rate of fare, because the City is not, in terms, bound or obligated in any manner, under Section 8, only the Minneapolis Street Railway Company being made subject to the terms, conditions and provisions, etc.

(i) If, however, Section 8 may be properly construed as touching everything, so far as applicable, contained in the old ordinance, then there is expressly reserved to the City the right to pass ordinances touching *everything* contained in the original ordinance, the terms of Section 8 making the Minneapolis Street Railway Company subject not only to the original ordinance but to all amendments thereof which had then been passed and to all *ordinances which might subsequently be passed.*

This brings us to a discussion of the third and last point in the case.

III.

THE ORDINANCE OF FEBRUARY 9, 1907, OF WHICH COMPLAINT IS MADE, IS AUTHORIZED UNDER THE POWER RESERVED TO THE CITY COUNCIL BY SECTION 8 OF THE ORDINANCE OF SEPTEMBER 19, 1890.

It was earnestly contended at the argument in the Lower Court that, the language of Section 8, Ordinance of September 19, 1890 (See Transcript of Record, page 21) did not in any manner refer to the matter of rates, and the learned Judge of the Lower Court so held. (See bottom page 132, Transcript of Record).

It was claimed, and so held by the Lower Court, that the words, "in the construction, maintenance and operation of said lines of street railway," related merely to those rules and regulations which

might reasonably be made by the City Council in the exercise of its police power.

If such is the proper construction of the language used in Section 8, then, of course, the whole section is unnecessary as a reservation of power to the City Council because it is well settled that the City has such power, whether any express reservation of it is made in the ordinance or not.

It is our contention that those words cover *every phase* of the relation existing between the Street Railway Company and the City of Minneapolis, so far as an electric line is concerned,—conceding to the fullest extent that the Ordinance of 1875, as confirmed by the legislature of 1879, constituted a contract with reference to a *horse* street railway as between the complainant and the City of Minneapolis,—so that the complainant could not be compelled to reduce its fare below five cents for each passenger for a continuous ride of not exceeding three miles in length over its *horse* street railway lines.

It was undoubtedly competent for the parties to this litigation to provide, by the terms of the Ordinance of September 19, 1890, for the reservation of the power in the City of Minneapolis, to change the terms of the former ordinance, not only with reference to the various things affecting the construction and maintenance, but also the rate of fare and the length of a continuous ride, which, it seems to us, would naturally fall under the head of "operation."

The question, therefore, is this: Is there in this Ordinance of September 19, 1890, such a reservation of power? We understand it to be conceded by complainant's counsel, that, if the words "construction, maintenance and operation," may properly include matters of fare and length of ride, then there *is* such a reservation of power in the City, under the terms of said Section 8; and there is an implication to this effect in the language used by the learned Judge of the Lower Court.

The Minneapolis Street Railway Company is expressly made *subject*, not only to the *"conditions, limitations,* and *other provisions"* of the ordinance of 1875, as the same has been amended, but also to all other ordinances of the City then in force, and which the City might *thereafter* pass.

As we have before pointed out, the City does not, in terms, bind itself to anything,—while the Minneapolis Street Railway Company is thus made *subject* not only to the ordinances then in force, but to such as might thereafter be passed.

It appears to be the contention of the complainant's counsel, that the words, "in the construction, maintenance and operation of said lines of street railway," constitute a *limitation* upon the balance of the section,—in other words, that the section would have been *absolutely comprehensive* had these words been omitted,—but that, with these words added, the whole section refers only to those rules and regulations which the City Council might, in the exercise of its police power, properly pass.

It needs no citation of authorities to the effect that all provisions in grants and contracts made by municipalities, with reference to reservation of power, are to be liberally construed in favor of such municipalities. (See *Freeport Water Co. v. Freeport City,* 180 U. S., page 587, and cases there cited).

There the language of the reservation was that the State reserved the power to prescribe for the government of corporations *"such regulations and provisions as it may deem advisable."*

This Court, in referring to this language said:

> *"The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The Supreme Court of the State has construed it to be of greater import than the usual reservation of the power to alter or amend the charters of corporations.*
>
> "The plaintiff, however, contends that it was not intended by the terms, 'regulations and provisions' to interfere with the internal business management of the corporation itself, but to regulate those classes of acts which control the relation existing between the stockholders and individuals and the corporation as an entirety, and the relation between corporations and third persons,—that is, the manner of carrying on their business or exercising the powers of the corporation.
>
> "We think the construction is too narrow. The Statute made no distinction between the internal and external business of corporations —between their relations to stockholders and their relations to third persons—such are but special exertions of the power which the Legislature possesses."

In the case of *City of Danville v. Danville Water Co.*, 178 Ill. 299 (53 N. E. Rep. 118) the Supreme Court of Illinois held, that the language of the General Incorporation Act, to-wit, "that the General Assembly shall at all times have the power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this Act," should be liberally construed in favor of the State, and that it was a reservation of power to regulate rates.

There, the Danville Water Company had been incorporated under the General Incorporation Act and had obtained a franchise from the City of Danville,—the latter being authorized by the Legislature to contract with such company "for a supply of water for public use for a period of not exceeding thirty years." The Supreme Court of Illinois held that under the power to "contract for a supply of water for public use for a period not exceeding thirty years," there was no implied power to bind the city and its inhabitants to pay a *fixed* price for the whole period. The supply could be made for the entire term—that being expressly provided, for,—while the rates should be determined from time to time, according to the principles of the common law.

The General Incorporation Act was approved April 9, 1872, and on the following day, a City and Village Act was approved, which provides as follows:

> "The City Council shall have power to provide for a supply of water * * * by the construction and regulation of * * * water works * * * and to borrow money therefor, and to authorize any person, or private corporation, to construct and maintain the same, *at such rates as may be fixed by ordinance, and for a period of not exceeding thirty years.*"

The Supreme Court of Illinois held that, by this Act the City of Danville was expressly authorized to contract for the construction and operation of water works for the full period of thirty years, but not for the price to be charged for that period.

The Court said:

> "The clause 'for a period not exceeding thirty years' qualifies the words, 'construct and maintain the same,' but does not qualify the words, *'at such rates as may be fixed by ordinance.'*"

It will be noticed that in the opinion in the last cited case, the Court said:

> "That the right to prescribe such *regulations* and *provisions* as the legislature might deem advisable was even broader than the usual reservation of power 'to repeal, alter, amend, or modify' charters of corporations."

As we understand the contention of counsel, it is not claimed that the words "shall at all times be subject to all the conditions and limitations and other provisions, etc." are not so comprehensive as to include ordinances touching rates and length of ride, etc. It is conceded, as we understand counsel, that "conditions, limitations and other provisions" would necessarily include everything upon

which the City Council might properly legislate. But, it is contended that the words "construction, maintenance and operation" are a limitation upon what would otherwise be a *general reservation* of power, including the power to fix or change rates, or length of continuous ride.

The Minneapolis Street Railway Company is a Minnesota corporation, and, as such, is invested with certain rights and privileges granted to it by the Statutes of that State. With reference to those rights and privileges as a corporation, the City of Minneapolis has nothing whatever to do, and if it should attempt, under the power reserved, by Section 8 of the Ordinance of September 19, 1890, to affect in any manner those rights and privileges, it would undoubtedly be met with the objection that the reservation of power was not broad enough to cover such legislation, and this would undoubtedly be true.

The City of Minneapolis, however, granted, in 1875, (and the legislature of 1879 confirmed that grant) to the complainant, the right to "construct, maintain and operate" a horse street railway within the limits of the City.

The language of Section 1 of the original Ordinance of July 9, 1875, is, "The right and privilege of *constructing* and *operating,* etc." In Section 3 of that ordinance, it is expressly provided that, if the Minneapolis Street Railway Company should fail, within a reasonable time to "construct and put in operation" any line which may be ordered to be so constructed, then the City Council may grant

any other company the right to "construct and operate a street railway in the street or streets."

Suppose that the Minneapolis Street Railway Company had constructed a line pursuant to the directions of the City Council, and then proceeded to operate cars upon the same, but charged in each instance a fare of twenty-five cents per passenger for one continuous ride. Could it be claimed that it had complied with the requirements of Section 3? It could say, technically, that it had "constructed and put in operation" the line required, but, would not any Court say that "put in operation" meant running cars for the accommodation of passengers, at the rate of five cents? Would not the question of fare fall under the head of "operation," and be one of the *essential elements* of such operation?

Would the Minneapolis Street Railway Company under the terms of Section 8 of the Ordinance of September 19, 1890, be heard to say, that it could make the rate of fare within the city limits, twenty-five cents per passenger, or any price it saw fit, because the words "in the construction, maintenance and operation" used in Section 8, did not subject it to the provisions in regard to rate of fare fixed by the old ordinance of 1875?

If the contention of counsel is correct, and the reasoning of the Lower Court sound, the Minneapolis Street Railway Company is absolutely unhampered in the matter of fares, so far as the City of Minneapolis is concerned. There is no express provision in the Ordinance of September 19, 1890, with

reference to the rate of fare, and, if the language of Section 8 does not "subject" that Company to the provisions with reference to the rate of fare contained in the original ordinance of 1875 (because the words, "construction, maintenance and operation" do not reach the rate of fare), then there is absolutely nothing in this Record with reference to the rate of fare which the Company may charge over its electric lines.

It seems to us that the obvious fact is that, all that the City of Minneapolis ever attempted to grant to the Minneapolis Street Railway Company was with reference to the "construction, maintenance and operation" of a street railway line, and whatever is contained in the original grant, and whatever power, authority, or permission has ever been given by it by subsequent ordinances, and especially the Ordinance of September 19, 1890, has been with reference to the "construction, maintenance and operation" of street railway lines. The rate of fare originally determined was certainly with reference to the operation of a line. Operation of street cars necessarily includes carriage of passengers. The Company could not be said to be operating a street railway line unless it provided cars which reasonably met the requirements of the traveling public. It could not operate cars without some charge for such carriage. It could not operate a street railway system, without fixing upon some reasonable limit to the distance for which a passenger could be carried for one fare. It is impossible to conceive of the

operation of a street car line without taking into consideration, not merely the cars provided and the rails upon which they may run, and the repairs which must necessarily be made upon them, but also the length of ride and the rate of fare.

These things, it seems to us, are as much a part of the "operation" of a street car line as the providing of cars itself. We know that the rate of fare is always an essential of *successful* operation. So far as this case is concerned, it make no difference whether these words "construction, maintenance and operation," be construed to include the rate of fare or not, inasmuch as if they do not include the rate of fare, there is, clearly, no attempt to contract with reference to such fare. And, on the other hand, if they be construed to include the rate of fare, then there is, clearly, a reservation of power in the City Council to make the change contained in the Ordinance of February 9, 1907.

The original grant, as well as the subsequent ordinances, relate to the "construction and operation" of a street railway line. The rate of fare was made one of the conditions of the operation of the line, by Section 8 of the original ordinance.

On July 3, 1878 (See page 8, Transcript of Record) the Minneapolis Street Railway Company was authorized to "construct and maintain" a certain railway line, which was known as the "motor line." There is nothing contained in that ordinance with reference to the rate of fare, and nothing to indicate that that ordinance was in any way an amendment of the previous ordinance of July 9, 1875, and yet,

Section 2 provides, as does Section 8 of the Ordinance of 1890, that, "in the construction, maintenance and operation of said line," the Company should be subject to all the conditions, limitations and other provisions of the previous Ordinance of 1875.

If counsel's present contention is correct, the words "in the construction, maintenance and operation," limit the word "subject," so that the Company would in no manner be bound with reference to the rate of fare, because that matter could not be included in "construction, maintenance and operation." It seems to us perfectly obvious that those words, "construction, maintenance and operation," if they were used intelligently and with design were intended to *amplify* rather than to *restrict* what follows in the section. In the construction of the line, the manner of laying the rail, the size and form of the rail, paving between the rails, or on both sides of the rail, the manner of placing the poles for the carrying of the wires, whether in the center of the street or at the sides of the street, the kind of cars that should be run, and the manner in which the wires should be strung,—all of these things undoubtedly relate to the "construction" of the line. While everything that relates to the keeping up of the line, or keeping up its efficiency, relates to "maintenance" of it. Everything else in which the City, as a municipality, would be interested, either for itself or for its inhabitants, would necessarily relate to "operation." Operating a line, undoubtedly has reference to the

accommodation of the public; that accommodation can be secured only by running a sufficient number of cars, properly provided, and at frequent intervals, and at a reasonable rate.

It can scarcely be questioned that the City of Minneapolis had the absolute right to withhold from the Minneapolis Street Railway Company permission to construct and operate an electric street railway system. Nor is it possible to conceive of any way that the Minneapolis Street Railway Company could have installed electricity as a motive power without the consent and permission of the City of Minneapolis, except by express enactment of the legislature. There was in 1890 no such enactment. The City of Minneapolis was the only source from which such consent and permission could be obtained.

Having then the right to grant or withhold such permission, it had the absolute right to impose upon such grant any conditions it saw fit to impose. And, if the Minneapolis Street Railway Company accepted the grant, it necessarily accepted it with all the conditions imposed. (See *Southern Bell Telephone and Telegraph Co. v. City of Richmond*, 98 Fed. Rep. 671 and also same case decided by Circuit Court of Appeals, in 103 Fed. Rep., 31).

Having the right, therefore, to impose conditions upon its consent, the pertinent question arises: What is the significance and meaning of Section 8 of the Ordinance of September 19, 1890?

This, as has been many times observed in this Brief, is an independent ordinance. It is not, in

effect, an amendment, nor does it in any way *purport* to be an amendment of the ordinance of 1875. There is nothing in Section 8 of this ordinance at variance, or inconsistent with any other section or provision contained in the ordinance. It is in no sense obnoxious to the grant or permission to "construct and operate" an electric street railway.

It cannot be said here, as was said in the case of *Detroit v. Detroit Citizens Street Railway*, 185 U. S., page 388, that the so-called "reserved power" must be construed with reference to the clear agreement or contract previously entered into with reference to the *same subject* matter touching the rate of fare.

It is not the *same subject matter*, nor is there anything in the Ordinance of September 19, 1890, relating to the *matter of fares*. The most that can be said is, that the entire ordinance is silent upon the question of fares.

No one, it seems to us, can read the Ordinance of September 19, 1890, without coming to the conclusion that the City of Minneapolis was merely granting the right and privilege to construct and operate an electric street railway system, and that the Minneapolis Street Railway Company should be subject to the previous ordinances relating to street railways, and should also be subject to all future ordinances which the City Council of Minneapolis might deem it proper and advisable to pass.

It is intimated in the opinion in the last cited case that, it was not reasonable to suppose that so

important a matter as the rate of fare should be left to the judgment and discretion of the City Council, And yet, it is undoubtedly true that, in perhaps a majority of cases, the rate of fare which public service corporations are now allowed to make, is subject to regulation and control, either by the municipalities or by the State. There are comparatively few instances in which such corporations have any *contract right* with reference to a fixed rate of charge. There is always between such corporations and the public, the constitutional provisions, which will not permit a rate to be fixed so low as to result in practical confiscation of the property. It is now generally believed that such provisions are an ample protection against the fixing of unreasonable rates by either municipalities or legislatures.

An examination of the opinion in the case last cited will show how easily that case may be differentiated from the one at bar. There, by Act of Legislature, it was expressly provided that the City of Detroit might establish "by agreement," the rate of fare to be charged by the street railway company. (See page 374). In granting permission to the Street Railway Company, the City Council of Detroit did establish "by agreement," the rate of fare. In the same ordinance which was passed pursuant to legislative authority, to establish "by agreement" the rate of fare, was a provision which reads as follows:

> "It is hereby reserved to the Common Coun cil of the City of Detroit, the right to make

such further *rules, orders,* or *regulations* as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

In 1879, acting under legislative authority, the City Council extended the grant of November 24, 1862, by ordinance. That ordinance contained the provision: "The right to *amend* or *repeal* this ordinance in case of its *violation* by said company or companies is expressly reserved."

There are several similar ordinances, passed at different times, under the same legislative authority, extending the lines of the Detroit Citizens Street Railway Company,—all of them having substantially the same provision in regard to the right to make "further rules, order or regulations."

The gist of the decision of this Court in that case is as follows:

(1) The Legislature of the State of Michigan had expressly granted to the City Council full power and authority to fix, *by agreement*, and not merely as a *legislative function,* the rate of fare to be charged;

(2) Such rate of fare had been fixed, pursuant to such legislative authority, by the City Council of Detroit, and the ordinance fixing such rate of fare having been accepted and acted upon by the Detroit Citizens Street Railway Company, constituted a contract;

(3) That the reserved right contained in the several ordinances "to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public," had reference only to those matters incident to the construction and operation of the road, such as the location of the tracks, switches, turnouts, repair of pavement between tracks, frequency of cars, stopping at crossings, etc., many, or most of which, subjects had been touched upon in the same ordinances. The City Council having been expressly authorized by the Legislature to fix the rate of fare "by agreement" it was not thought that such doubtful language as was used in the section just referred to should be construed to mean that the City Council might, of its own motion and without the consent of the other party, change that which had already been fixed by *express agreement.*

The fact was also adverted to in the opinion that, from 1862 to 1899, no attempt had been made to exercise this supposed power of alteration with respect to fare; and so far as the record in the case discloses, no claim on the part of the City Council had ever been made that under that section it had the right to change the rate of fare which had been agreed upon.

It was also a significant fact in that case that, in the Ordinance of November 14, 1879, which extended the ordinance of November 24, 1862, the right to amend or repeal the ordinance of extension was reserved *only in case of violation by the com-*

pany of the provisions of the ordinance. This, of course, by strong implication, would indicate that there was reserved no power to amend or repeal, *except in case of such violation.*

The various ordinances contained many provisions, which would properly be called merely rules and regulations for the running of the street railway system, and the language of the "reserved power" is limited to the passage of such "further rules, orders and regulations."

Here it will be noticed that, by Section 6 of the Ordinance of September 19, 1890, provision is made for a system of transfers from one line to another. That is entirely new,—there being nothing in any of the previous ordinances relating to transfers. The street railway company, by that section, agrees to furnish transfers at the junction of said lines at Washington and Hennepin Avenues. There is nothing in that section which relates to the length of a continuous ride. Nor, is there anything said in the section with reference to the rate of fare, the language being merely "one full fare."

Section 6 is certainly, in effect, a modification of Section 8 of the Ordinance of July 9, 1875. Under the old ordinance relating to horse cars, the Company was authorized to charge a full fare for one continuous ride, and the City Council could not designate one continuous ride exceeding three miles in length. By Section 6, a transfer could be demanded by any passenger, upon payment of a full fare (whatever that might be) from one line to another, provided they converged or met at Wash-

ington and Hennepin Avenues, in said City.

The Record shows that, after the lapse of a little less than three years, and on the 14th day of July, 1893, the City Council of the City of Minneapolis passed the ordinance, Exhibit "A," page 52, Transcript of Record, which is known as the "Harvey Transfer Ordinance." This ordinance was a complete revolution of the transfer system. *Instead of transfers from one line to another, at the junction of Washington and Hennepin Avenues,* it provided for transfers from one line to another, at *any point where such lines crossed or met.* It also provided for the issuance of such transfers by the conductors on the cars to passengers demanding the same.

This, it can readily be seen, was a great extension of the right of transfer provided for under Section 6 of the Ordinance of September 19, 1890. Under Section 6, the privileges of transfer were limited to those passengers who might ride to the junction of Hennepin and Washington avenues, and there demand the transfers.

During a little less than three years of experience under Section 6 of the Ordinance of September 19, 1890, the public found the advantages of said transfer system of but slight consequence, and much agitation preceded the passage of the Harvey Ordinance (July 14, 1893). It appears by the Record that, after the passage of that ordinance, this complainant refused compliance with it, and thereupon an action was commenced by the City of Minneapolis to compel the Minneapolis Street Railway Company to issue transfers, as required by that ordi-

nance. The complaint in that action was dated November 11, 1893, and appears as Exhibit "B." (See pages 54 to 70, Transcript of Record). The answer of this Complainant in that action appears on pages 70 to 83,—the same counsel appearing here for the Complainant also appearing for it in that action. In the answer in that case, the Minneapolis Street Railway Company planted itself on what it alleged to be its *contract* rights under the ordinance of July 9, 1875, and the Ordinance of September 19, 1890. It contended that Section 6 of the latter Ordinance was only a modification of Section 8 of the Ordinance of July 9, 1875, and that, by Section 6, it was only bound to give transfers *at the points, and to passengers designated in said Section* 6. It made precisely the same contention with reference to the rate of fare, and the length of ride in that case that it is making here. The case was tried in the District Court of Hennepin County, Minnesota. The findings of fact, and conclusions of law appear in full on pages 93 to 103, Transcript of Record,—while the memoranda of the learned Judge of the District Court, accompanying the findings, appears on pages 106 to 115.

It was there held, (1) that the City of Minneapolis had not then, and never had, any authority to enter into an irrevocable contract with the Minneapolis Street Railway Company; (2) that the Ordinance of September 19, 1890, was a mere permit or license to construct and operate an electric street railway line; (3) that, there was no contract, either in fact or in form, between the City of Minneapo-

lis and the Minneapolis Street Railway Company, with reference to the rate of fare to be charged upon its electric lines; (4) that, the City of Minneapolis was invested with the legislative power of controlling, fixing and regulating the rate of fare; and, (5) that, under Section 8 of the Ordinance of September 19, 1890, the City Council had expressly reserved to itself the full power and authority to further legislate in all matters controlling and regulating said electric street railway, including the rate of fare, and the issuance of transfers. In other words, the decision of the learned Judge of the District Court was a complete denial of all points which were advanced there on behalf of the complainant, the Minneapolis Street Railway Company, and which are now being advanced here.

No judgment was ever entered in that case. The Company put into effect the transfer system ordered by the City Council, and thereupon, on May 19, 1894, a stipulation of dismissal of the action without judgment, was entered. The stipulation appears as Exhibit "E," on page 116 of the Transcript of Record.

It could not be said, therefore, in this case, as was said in the *Detroit* case just cited, that no claim, for a long period of time, had been made on behalf of the City, as to its rights under Section 8 of the Ordinance of September 19, 1890. Nor can it be said that the Ordinance of July 14, 1893, which revolutionized the transfer system, was a mere *regulation* touching the physical operation of the street railway line. It vitally touched the rate of fare.

It cannot be said that the rate of fare is not touched when the service is doubled or trebled. It would be idle to say that the City Council *may not reduce the fare,* but *may increase the service,* or, as in this case, *the length of ride.* And this is precisely the view which the Minneapolis Street Railway Company took of the case at that time. It maintained that the ordinance of 1893, regulating transfers, was an impairment of its contract. Under the ordinance of 1875 it was entitled to charge five cents for a continuous ride of not exceeding three miles. Under Section 6 of September 19, 1890, that right (it claimed) was only modified to the extent of giving transfers in the cases specifically mentioned. It claimed then, as it claims now, that Section 8 of the Ordinance of September 19, 1890, did not reserve to the City any right to alter, change or modify, either the rate of fare or the transfer system.

From 1894, when the transfer system required by the Harvey Ordinance was put into effect, to 1907, no change has been ordered by the City Council with reference, either to the transfer system or the rate of fare; but the City has consistently claimed, during all that period, full right, under its reserved power, and under its charter powers, to control and regulate both.

Unquestionably, Section 8 of the Ordinance of September 19, 1890, should be liberally construed, in favor of the City. Every reasonable presumption should be given in favor of the "reserved pow-

er." This seems to be the universal doctrine of the cases.

In *Fath v. Tower Grove and L. Railway,* 16 S. W. Rep., page 913 (Missouri), the power reserved to the municipality was in this language:

> "The municipal assembly shall have power by ordiance to determine all questions arising with reference to street railways in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting right of way, or regulating and controlling them after completion."

It will be noticed that, while the first part of this reservation may be broad, the latter part is restrictive. Under that reserved power the municipality passed an ordinance creating a liability against the street railway company for certain acts, which otherwise were not actionable.

It was contended by the Street Railway Company that it was beyond the power of the municipality to pass this ordinance. But the Court held that, in granting permission to the Street Railway Company to occupy the streets, it could grant such permission absolutely, or upon terms and conditions, and that, if the railroad company accepted the permission to occupy the streets, it took such permission with all conditions and terms imposed.

The case last cited seems to be an extreme one. It permitted the municipality to enter the realm of general negligence law, and to create a liability, where, under the general law, no such liability before existed; and yet, the ordinance was sustained, upon the broad ground, that such liability was im-

posed as a condition to occupation of the streets by the railway company.

In *Chicago General Railway v. City of Chicago*, 52 N. E. Rep. 880 (Ill.), it was held that, where the consent of a city must first be had before a street railway company, organized under general laws, could lay its track therein, the city might impose such conditions, as it deemed best for the public interest, upon the grant of such permission. There, the city imposed as a condition to its permit an annual tax of five hundred dollars on each mile of road constructed.

The Court said:

> "It was clearly within the power of the council, by its ordinance, to make this additional condition if it so desired, and the courts cannot indulge the presumption, that the act was done for an illegal purpose—it being apparent that it could be done legally."

Again, the Court said:

> "It must be admitted that the defendant could only occupy the streets of the city with its tracks, with and by the consent of the municipal authorities. That consent could be given or withheld, as these authorities deemed proper, and upon such conditions as they considered for the best interests of the public. They granted the privilege and named the conditions. The defendant accepted without qualification. It has availed itself of the benefits of the contract, and now seeks to repudiate the conditions."

This, it seems to us, is precisely the condition here. The City of Minneapolis could have with-

held its permit to construct and operate an *electric* railway. If it could wholly withhold its permit, it could impose such conditions as it saw fit, and one of those conditions was, that the Minneapolis Street Railway Company should always be subject, not only to such ordinances was were then in force with reference to street railways, but to all such other ordinances as might thereafter be passed.

It seems to us that it would be doing violence to the language and purpose and evident intent of that ordinance to make the *reservation* any less comprehensive than the *grant*. The very language of the grant is, "to construct and operate," and, "to erect, construct and maintain." These words are sufficiently comprehensive to give the complainant all the rights it can possibly have in the streets of the City of Minneapolis, and no reason occurs to us why those words, to-wit, "construction, maintenance and operation" should have any less comprehensive meaning when used in Section 8. The City gives the company the right to *construct* and *operate* an electric street railway line in the City of Minneapolis. It is not only made subject to such merely incidental rules and regulations as might be passed touching the physical operation of the system, but the language of Section 8 is that, it should be "subject to all the *conditions, limitations* and other *provisions*," *etc.*

It seems to us that the language of this section is *designedly comprehensive*, and when we consider that in this section providing for reserved power, we find the *same language* which is used in describ-

ing the *extent* of the grant, it is difficult to hang a doubt upon its true construction.

The rate of fare, and the length of a continuous ride, are just as essential parts of "construction, maintenance and operation" in one paragraph, as they are in the other. It would of course, be perfectly idle for the City to contend that, because fare was nowhere mentioned in the granting parts of this ordinance, consequently, the Minneapolis Street Railway Company was to construct, maintain and operate its lines without any charge for carriage. Fare is an absolute essential to the operation.

The construction placed upon Section 8, by the learned Judge of the Lower Court, practically deprives it of all meaning and force. The right to exercise police power exists, independent of any reservation, and could not, in any event, be bartered away. It seems to us utterly useless that Section 8 should have been added to the ordinance of September 19, 1890, if such construction is to be placed upon it. The City could, undoubtedly, have imposed as a condition to the granting of its permission, a provision in all respects like the ordinance of February 9, 1907. If the Street Railway had accepted the ordinance, it would, undoubtedly, have been bound by the conditions.

The City reserved, however, the right to pass further ordinances, and expressly provided that the Street Railway should be subject to all *conditions, limitations* and *provisions* of such *further ordinances.*

Adopting, therefore, the ordinary rule of construction which would apply between individual parties to a contract, the *reservation* should be as broad as the *grant*, unless words of a *certain import* are used to *restrict* the same. Even the ordinary rule of construction should, we think, determine this point in favor of the appellant. But, if the general rule of construction, which applies to all grants from municipalities to individuals, or corporations, is applied, there would seem to be no ground for reasonable doubt, as to the scope of this reservation.

It has been so many times asserted in the decisions of this Court, that it has become axiomatic in the law, that any party claiming under a public grant from the State or a municipality, must make out the rights contended for by terms which clearly and unequivocally convey them; and that it is enough to deny the privileges contended for, if, upon considering the grant, the mind rests in *doubt* and *uncertainty* as to whether they are intended to be conferred, or not. See *Blair v. Chicago*, 201 U. S., page 487 of the opinion.

The Ordinance of September 19, 1890, must be construed as a whole. It must, as against the Minneapolis Street Railway Company, be construed strictly; and this rule of construction applies just as strongly to the *reservation* as it does to the *grant*. It gets nothing by the ordinance except what is clearly and unequivocally given, and it gets that with all the conditions and limitations imposed, and all those conditions and limitations are to

be liberally construed in favor of the municipality.

In the *Blair* case, above cited, it is said:

> "Courts must consider the situation as it was when the particular act or ordinance was passed."

If this rule is applied to the case at bar, the power reserved by the City of Minneapolis, as construed by it, of complete control, not only of service but of rate of fare, is in strict accord with the *then general policy* of local control of public service corporations throughout the country.

What was, in fact, reserved, as now contended for by appellant was the very common power enjoyed by municipalities, and what the complainant received under that ordinance was precisely what was being generally granted at that time, and which has become quite universal since.

In the *Blair* case, this Court, in commenting upon an Act of the Legislature, said that, upon its face its was ambiguous and uncertain, and that it must be judged by the terms in which it was expressed. It was conceded that a construction could be given to it which would extend all the contracts with the city for a term of *ninety-nine years;* on the other hand, it was insisted that it could be maintained with at least equal force that the contracts should only run for a term of twenty-five years. It was said, therefore, that it must be uncertain whether the legislators voted for the act upon the former or the latter construction.

With reference to the matter this Court used the following language:

> "It may be that the very ambiguity of the act was the means of securing its passage. Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be *intelligently* granted, or *purposely* withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature, with a view to obtaining from such bodies the most liberal grant of privileges that they are willing to give. This is one among many reasons why they are to be strictly construed."

Citing a number of cases to this effect. See page 471, 201 U. S. Reports.

It seems to us that no one would assert that, if the appellant's construction of Section 8 of the Ordinance of September 19, 1890, is not *clearly right*, it is in any event *clearly wrong*.

In *Jackson County Railway Company v. Interstate Rapid Transit Railway Co.*, 24 Fed. 306, it was held, that while Kansas City, Kansas, had general supervision and control of its streets, and had power to permit the occupation of its streets by a street railway company, it was not authorized to enter into a binding contract with such company, or to grant to it exclusive privileges in the streets. In that case, Mr. Justice Brewer, said:

> "Doubts as to what is granted are resolved in favor of the grantor, or, as often epigrammatically said, *a doubt destroys a grant.*"

In *Commonwealth v. Railway*, 27 Pa. St. 339, the Court said:

> "A *doubtful* charter *does not exist*, for, whatever is doubtful is decisively certain against the corporation."

In another case reported in 21 Pa. St., 22, the same Court said:

> "In the construction of a charter, to be in doubt, is to be resolved, and every resolution which springs from doubt is against the corporation."

The Supreme Court of Connecticut, in *Farrell v. Railway*, 61 Conn., 127, expressed the rule as follows:

> "In all statutes giving power to a corporation, or to an individual, or to a body, things not enumerated in the grant or excepted out of it, are held to be as absolutely negatived as though there are express words of negation."

Without the Ordinance of September 19, 1890, the complainant would have no pretense of right to occupy the streets of Minneapolis with an *electric* street railway line.

As before stated, it is operating an *electric* street railway line, and no other.

The Ordinance of February 9, 1907, can relate, therefore, only to the line which complainant is operating, and it is with reference to the *electric* street railway line that complaint is made of said ordinance.

Can it be said that complainant has, with reference to such *electric* street railway line, a clear and unequivocal right, *expressly granted*, to charge *five cents* for each individual passenger for each *continuous ride* of not exceeding *three miles* in

length? And, can it be said that the right to so operate an electric line in the streets of Minneapolis, and so charge a fare of *five cents* for each *continuous ride*, not exceeding *three miles, extends throughout the term of complainant's charter?*

All these things are specifically determined and adjudged in favor of the complainant by the decree appealed from.

Endlich on Interpretation of Statutes, Sec. 354, tersely expresses the proper rule of construction to be applied as follows:

> *"Whatever is not given in unequivocal terms is deemed as expressly withheld."*

In *Long v. Duluth*, 49 Minn., 281, the Supreme Court of Minnesota said:

> "Public policy does not permit an unnecessary inference of authority to make a contract inconsistent with a continuance of the sovereign power and duty to make such laws as public welfare may require."

In *Georgia Banking Co. v. Smith*, 128 U. S. 174, it was said:

> "The exemption (from legislative control) must appear in such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State."

In *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, this Court, speaking of a contract which was claimed by the railroad company with reference to its right to change the fixed rate of fare, and of the reserved power of the State to change the same, said:

> *"If there is a reasonable doubt, it must be resolved in favor of the existence of the power."*

It must be conceded that the City had the right to impose, as a condition to the passage of the Ordinance of September 19, 1890, a reservation of power to change, or regulate, the rate of fare, and the length of a continuous ride, and the giving of transfers. In other words, it was perfectly competent for the City to reserve to itself full power in reference to all of these things. The exercise of such right to so regulate fare, length of ride and giving of transfers, being subject only to the constitutional limitation, that it could not fix a rate of fare so low as to constitute a practical confiscation of the property of the complainant. Having that right, and having used language, which, it seems to us, could well be intended for no other purposes, it can be said here, as was said by Chief Justice Marshall, in *Providence Bank v. Billings*, 4 Pet. 514, 561:

> "Its abandonment" (of power) "ought not to be presumed in a case in which the *deliberate* purpose of the State to abandon does not appear."

Can it be said that it is clear, beyond a reasonable doubt, that the City *did not intend to reserve this full power of regulation?*

In the case of *Stone v. Farmers' Loan and Trust Co., supra*, page 326, the rule, as above declared by Chief Justice Marshall, is said by this Court to be

elementary, and that the cases which have considered and applied it are numerous.

See also

Fanning v. Gregoire, 16 Howard, 530.

Richmond Co. Gas Light Co. v. Town of Middleton, 59 N. Y. 229.

Minturn v. LaRue, 23 Howard, 435.

Hoffman v. Quincy, 4 Wallace, 435.

Alcott v. Supervisors, 16 Wallace, 678.

Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167.

Indianapolis Cable St. Ry. Co. v. Citizens St. Ry. Co., 127 Ind. 369.

In the latter case it was said:

> "A municipal power, having control over its streets, may prescribe the motive power to be used in moving street cars, and when it has prescribed one kind of power, the company cannot use another kind. As the grant of a special charter is construed strictly against the corporation, where the right to use such motive power is prescribed, the company can not successfully maintain its right to use another or different power."

Citing cases from various jurisdictions to the same effect.

In *Elliott on Roads and Streets*, 2nd Ed. Sec. 736, it is said:

> "It is competent for a municipal corporation, invested with control of the streets, to prescribe what motive power shall be used in drawing the cars over the track, and when an ordinance does prescribe what the motive power shall be, the company cannot use any other.

> Thus, where the provision is, that the cars shall be drawn by horses or mules the company cannot use steam power, nor, can it construct a cable road. Grants are construed against a corporation or company claiming a special franchise or privilege, and under this familiar rule, a street railway cannot successfully assert the right to use any other motive power than that specifically mentioned in the ordinance licensing it to use the streets of the municipality."

See also *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. Rep. 116.

Under the Ordinance of July 9, 1875, it is clear that the Minneapolis Street Railway Company had no right to construct or operate anything but a *horse* or *pneumatic power* railway. It has never acquired any other right to operate an electric street railway than that which was given to it by the Ordinance of September 19, 1890. That ordinance has never been confirmed by the Legislature. It cannot, therefore, stand as a contract or as an irrevocable grant. It is merely a permit to occupy the streets with an electric line. It contains no express provision with reference to the rate of fare, or the length of a continuous ride. It is not an amendment of the Ordinance of July 9, 1875, nor, does it purport to be such. Nothing is incorporated into that Ordinance of September 19, 1890, except what was incorporated by the language of Section 8. That language does not purport to bind the City of Minneaupolis, or subject it in any form to any limitations or conditions. It imposes no promises or obligations upon the City. It *does*, in terms,

however, *expressly subject* the Minneapolis Street Railway Company, to the limitations, conditions and provisions of all ordinances then in force and which may thereafter be adopted.

The Minneapolis Street Railway Company was granted, by that ordinance, permission to *construct, maintain* and *operate* an *electric* street railway system, and Section 8 expressly reserves to the City the right to subject the Company to all limitations, conditions and provisions of any ordinances which it might deem advisable to pass, in the *construction, maintenance* and *operation* of such electric street railway line.

As we have before observed, the language of the reservation is as broad as the grant. Of this there can be no possible doubt. The same words are used in both sections, and, we respectfully submit that, even though it should be finally held that the complainant was organized as a corporation under Title I, Chapter 34, Revision of 1866, and that the term of its charter was fifty years, and that, under the various ordinances set up in the Amended Bill, it had a contract with the City to charge five cents for a continuous ride, there was still reserved to the City, by Section 8 of the Ordinance of September 19, 1890, full power and authority to change the rate of fare, the length of ride and the system of transfers.

If there had been no horse car ordinance of July 9, 1875, confirmed by the legislature in 1879, there could be no pretense of a *contract right* to charge a fixed rate of five cents for each *continuous ride* of

not exceeding *three miles in length.*

If there had been no Ordinance of September 19, 1890, there could be no pretense of a *right* on the part of the complainant to operate an *electric* street railway in Minneapolis.

The City of Minneapolis was as powerless, in 1890, to contract with reference to the *old* ordinance as it was with reference to the *new* one. It might grant or withhold its permit to operate with electricity; it might give an absolute permit or it might impose conditions.

In 1890, the old horse car franchise was practically worthless. The right to construct and operate an *electric* franchise was a thing of *great* value.

Can it be said that the *live* tree was grafted onto the *dead* bough, and that the *latter* gives life and character to the *former?* Is it not perfectly obvious that complainant is operating its *electric* lines under the Ordinance of September 19, 1890, and that the ordinance of 1875 is to all intents and purposes, except so far as the *Minneapolis Street Railway Company* is made *expressly subject* to it by the provisions of Section 8 of the latter ordinance, a *dead letter?* When and where has the City of Minneapolis *contracted* not to reduce the rate of fare below five cents for one continuous ride on the *electric* railway lines of this Complainant? When and where, as to complainant's *electric* lines, has the City contracted not to designate a *continuous ride* to be more than three miles in length? When and where has the City irrevocably authorized the complainant to *"operate its cars upon all*

its lines of street railway in the City of Minneapolis, for and during the term of its charter, by electricity as a motive power," as alleged in said Amended Bill and as adjudged by the decree.

It will be noticed that, by the terms of the judgment or decree in this case, the contract as to fare is adjudged to arise out of the ordinances of 1875 and 1878, as confirmed by the Legislature in 1879; and yet, the ordinance of 1875 relates only to a *horse* or *pneumatic power* line, while the ordinance of 1878 relates merely to one *specific* line, on *First* and *Nicollet Avenues.* The action of the legislature of 1879 merely confirms these ordinances of 1875 and 1878. It does not give anything beyond what is granted by these ordinances. Only such "rights and privileges" as are "set forth and *qualified*" in said ordinance are legalized and granted by the Legislature.

In 1890, the City of Minneapolis had no contractual power. It possessed merely the legislative function of regulation and control. In the exercise of that function, one City Council could not control the action of a succeeding City Council, nor, does it, in terms, attempt to do so.

The sole question involved in this case is: Has the complainant an absolute contract with the City of Minneapolis by which it is entitled to charge for a period extending to the year 1923 (and according to the terms of the judgment, perhaps to 1937) a *fixed* fare of *five cents* for each passenger riding on its *electric* lines for *one continuous ride*, not exceeding *three miles in length?*

Whether or not the City of Minneapolis is empowered by the terms of its charter to fix and regulate the fares of this complainant, is wholly immaterial to this controversy. If the complainant, *as to its electric lines*, has no binding contract with the City with reference to its rate of fare, for a *fixed* period, and for a *fixed* ride, not exceeding *three miles* in length, then there is an end to complainant's case and its action must be dismissed.

The sole ground of jurisdiction in the Circuit Court is based upon the existence of such a contract, and its attempted violation by the City.

At the hearing the question was several times asked complainant's counsel, but always evaded, whether this complainant had, or claimed to have, an *exclusive electric* street railway franchise for the term of its charter.

If the complainant has a *contract right* to charge a *fixed* fare for a *fixed* ride, and for a *fixed* term, on its electric lines, it must necessarily follow that it has an *exclusive* electric franchise. And yet, an *exclusive* grant or franchise is a matter of *contract* between *competent* parties.

What is the evidence of such *exclusive* grant as as to the *electric* lines, or whence did the City derive its power to make such exclusive grant? Reiteration of the lack of evidence of such contract, and of the utter want of power in the City to make such a contract (even if, in form, it existed) may not strengthen appellant's argument, but it may, at least, emphasize the weakness of complainant's case.

We conclude this brief with the following summary of the propositions we have sought to establish:

I.

The Complainant was not, and could not be, organized as a corporation under the provisions of Title I, Chapter 34, Revision of 1866; but was properly organized as a corporation under Title II, Chapter 34, Revision of 1866. And, consequently, the term of its charter was only *thirty* years, and this term expired in 1903.

II.

As to its electric system (the only one it is operating), the Minneapolis Street Railway Company has not now, and never has had, any contract (even in form); and even if it had, the City utterly lacked the power to enter into such a contract.

III.

Lastly, if the Ordinance of September 19, 1890, should be held to be in the nature of a grant or a contract, Section 8 thereof clearly reserves to the City the power exercised by the City Council in the passage of the Ordinance of February 9, 1907 (the one complained of).

We, therefore, respectfully submit that the judgment and decree heretofore entered by the Circuit

Court of the United States for the District of Minnesota, should be reversed, and Complainant's Amended Bill of Complaint dismissed.

FRANK HEALY,
Attorney for Appellant.

WM. A. LANCASTER and
JOHN F. MCGEE,
Of Counsel.

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APPENDIX.

TITLE I, CHAPTER 34, REVISION 1866.

OF CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

Section 1. Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

Section 2. They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be, and also in the office of the secretary of state, in books kept for such purposes.

Section 3. Said articles shall contain:—

First. The name of the corporation, the general nature of its business and the principal place, if any, of transacting the same.

Second. The time of commencement and the period of continuance of said corporation.

Third. The amount of capital stock of said corporation and how to be paid in.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject.

Fifth. The names and places of residence of the persons forming such association for incorporation.

Sixth. The names of the first board of directors and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same are elected.

Seventh. The number and amount of the shares in the capital stock of said corporation.

And shall be published for four successive weeks in some newspaper printed and published at the capital of the state.

Sec. 4. When articles are filed, recorded and published as aforesaid, the persons named as corporators therein, become a body corporate and are authorized to proceed to carry into effect the objects set forth in said articles in accordance with the provisions of this title, and shall have perpetual succession, sue and be sued by its corporate name, have a common seal, which it may alter at pleasure, may render the interests of its stockholders transferable, establish by-laws and make all rules and regulations deemed expedient for the management of its affairs in accordance with law, and not incompatible with an honest purpose.

Sec. 5. No such corporation shall be formed to continue more than fifty years in the first instance, but it may be renewed from time to time for periods not longer than fifty years: *provided*, that three-fourths of the votes cast at any regular election for the purpose, are in favor of such renewal, and those desiring a renewal purchase the stock of those opposed thereto at its current value.

Sec. 6. A copy of the by-laws of the corporation with the names of all its officers appended thereto shall be posted in the principal place of business and be subject to public inspection.

Sec. 7. A statement of the amount of the capital stock subscribed, the amount of capital actually paid in, and the amount of indebtedness of the company in a general way, shall also be kept posted up in like manner, which statement shall be corrected as often as any material change takes place in relation to any part of the subject matter of such statement.

Sec. 8. The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so far as to show the name of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person making such transfer, from any liabilities of said corporation which were created prior to such transfer. The books of the company shall be so kept as to show intelligibly, the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concern ed, shall be subject to the inspection of any persons desiring the same.

Sec. 9. The private property of each stockholder in any corporation formed as herein provided, is liable for corporate debts in the following cases:

First. For all unpaid installments on stock owned by him or transferred for the purpose of defrauding creditors.

Second. For a failure by the corporation to comply substantially with the provisions aforesaid as to organization and publicity.

Third. When he personally violates any of the provisions of this title in the transaction of any business of the corporation, as officer, director or member thereof, or is guilty of any fraud, unfaithfulness or dishonesty in the discharge of any official duty.

Fourth. To the amount of the stock held or owned by him in all cases.

Sec. 10. The private property of no stockholder shall be levied on under the preceding section, unless such stockholder, as well as the corporation, is duly served with process in the action, and the issue involving his individual liability as aforesaid raised and determined; and in no case whatever shall such property be levied on while sufficient corporate property can be found to satisfy the execution or any part thereof.

Sec. 11. The officer holding an execution, which may be levied on private property, as aforesaid, shall make demand of payment thereon of the president, secretary, or some officer of the corporation, acting, or who was one of the last acting officers thereof, and if he does not forthwith pay said execution or point out corporate property that may be levied on, the officer shall indorse the fact of such demand, refusal or neglect upon said execution, and

thereupon may levy the same upon the private property of the stockholder served and impleaded as aforesaid. Such levy may be made to satisfy any balance due upon the execution after levy upon corporate property, or part payment out of corporate funds.

Sec. 12. Any corporation of the class specified in section one of this title, heretofore organized or attempted to be organized under former general laws, may conform their articles to the provisions of this title, and re-file the same with the secretary of state, as herein provided, and thereafter without any other act or ceremony shall become entitled to all the rights, benefits and privileges conferred herein; and all grants, transfers and conveyances, by the state or any citizen or corporation to any such corporation heretofore made, are hereby confirmed unto such corporation, and shall, upon the filing of their articles under this title, be deemed to accrue and enure to the benefit of such corporation as thus organized without any other act or ceremony whatever.

Sec. 13. Any corporation organized or re-organized under the provisions of this title, may obtain the right of way, over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites and grounds for depots, shops and other buildings requisite for the proper carrying on of the business to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices or other erection necessary for the convenient prosecution of their enterprise, all and any

lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property, and to canal in and along the valley of any such river, stream, lake or water course, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this title provided.

Sec. 14. They shall present to the judge of the district court in any county in which said improvements or any part thereof is or is to be located, or through which said railroad or telegraph line runs, or through which any river to be improved or canal to be constructed runs, or is to run, a petition signed by the president and secretary of said company or corporation, setting forth a description of the enterprise to be prosecuted by them, the termini thereof, the counties through which the same is to run, a general description of the land, property and real estate which it will be necessary to appropriate, take, use or overflow for the purposes of said enterprise, together with the names of the owners of any such property, if known.

Sec. 15. Upon the presentation of such petition the judge shall appoint three disinterested residents of any of the counties named in said petition, commissioners to meet at some point on the line of said

improvement on a day specified by said judge, and to inquire touching the matters contained in said petition, and the judge shall fix the fees of said commissioners.

Sec. 16. Said commissioners shall have power to adjourn from day to day, and to such places on the line of such improvement as they deem proper.

Sec. 17. Before entering upon their duties they shall severally take and subscribe an oath, before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment.

Sec. 18. At least five days' notice of the first meeting of said commissioners shall be given, in all cases, and in case of infants such notice shall be served on their guardians or the persons with whom they reside; in case of idiots, lunatics, or distracted persons, on their guardians, if they have any, if not, then on the person in whose care or charge they are found; and in cases of *femes covert*, on the husband as well as the *feme covert*, but notices to non-residents of the counties through which said improvements are to be constructed, shall be published in some newspaper printed in one of said counties for three weeks in succession, previous to the meeting of said commissioners.

Sec. 19. The commissioners shall meet at the time and place mentioned in the notice, and proceed to examine the entire line of said canal, telegraph line, railroad and improvement, or so much thereof as is described in said petition, and all the lands, property, or real estate which will be damaged, over-

flowed, taken, appropriated or used by or for the purpose of said enterprise, and which is described in said petition, and shall hear the allegations and testimony of all parties interested, and proceed to make in each case a separate assessment of damages which will result to any person, corporation or company, by reason of the construction of said canal, telegraph line, railroad or improvement, and shall determine and appraise to the owners of said land, property, easement or any other right, proposed to be taken, the amount of damages arising to them respectively, from the taking thereof, after making due allowance for any benefit that such owners may respectively derive from the canal, telegraph line, railroad or improvement aforesaid.

Sec. 20. Within three months after completing their said examination, and the making of said appraisement and assessment of damages, the said commissioners shall file the said petition, a copy of their appointment and oath, together with a full report of their doings in the premises, accompanied by a map showing the route and location of the proposed canal, telegraph line, railroad or improvement, in the office of the clerk of the court in the county where said application for the appointment of said commissioners was made, and shall give the same notice of the filing of their report as of their meeting.

Sec. 21. Upon the filing of said report, the petitioners, or any officers of, or other persons duly appointed by, said corporation, may make payment of

the damages assessed to parties entitled to the same, in manner following:

First. To parties laboring under no disability.

Second. To guardians of infants, husbands or trustees of *femes covert.*

Third. To guardians of insane persons, idiots, lunatics, and persons under other disability, and receipts for such payments filed in the office of the clerk aforesaid shall estop the parties giving them and their principals, when they act in a representative capacity, from all further claims or proceedings in the premises. Payments to parties residing in the state, but not in the county or counties through which said canal, line, road or improvement runs, as well as to infants, insane persons, and other persons under disability, who have no guardians, and payments to parties residing out of the state, and to persons whose names are unknown, and to persons who refuse to receive the payments when tendered, shall be made by depositing the same with the clerk of said court to be paid out under the direction of the judge thereof, and such deposit shall have the same effect as the first mentioned receipts, unless an appeal is taken by the party entitled thereto.

Sec. 22. Appeals from the assessments made by the commissioners may be taken and prosecuted in the court where the report of said commissioners is filed, by any party interested, and a written notice of such appeal shall be served upon the appellee, in the same manner as a summons in a civil action is served; *provided*, that such notice shall be served

at least twenty days before the hearing of said appeal; *and provided further*, that no appeal under this title shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

Sec. 23. The construction of such road, line, canal, or the prosecution of such improvement, shall not be hindered, delayed or prevented by the prosecution of any appeal; *provided*, the corporation execute and file with the clerk of the court in which the appeal is pending, a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy.

Sec. 24. The appellant shall file with the clerk aforesaid, a bond with sureties (to be approved by said clerk) in double the amount of the assessment appealed from, payable to the state for the use of all persons interested in the condition thereof, in which bond the proceeding appealed from shall be recited with condition for the due and speedy prosecution of said appeal, and to abide the judgment that may be rendered therein, and pay the costs of the appeal, if adjudged so to do by the court in reference to the matter in controversy.

Sec. 25. Appeals shall bring before the appellate court the propriety of the amount of damages in respect to the parties to the appeal, and unless the parties otherwise agree, the matter shall be submitted to a jury and tried as other appeal cases are

tried, and the court or jury, as the case may be, shall re-assess the damages aforesaid, making the verdict conform to the justice and facts of the case, but the rule for ascertaining and fixing such damages, shall be based upon the same principles that the commissioners are required to adopt in originallly appraising and determining such damages.

Sec. 26. Upon verdict or assessment, judgment shall be entered declaring that upon payment of the verdict or assessment, and costs, if any, the right to construct said canal line, railroad, or improvement, to overflow the lands, property, and real estate, and do the act in controversy in said appeal, and to take, use and appropriate any property in controversy on said appeal for the purposes aforesaid, shall, as against the parties interested in such verdict or assessment, be and remain in said corporation, their successors and assigns forever, and payments of such judgments may be made as payments of assessments by the commissioners are made, as hereinbefore provided.

Sec. 27. Any corporation organized under this title, may perfect record-evidence of title to the property and estate taken for the purposes of any canal, line, railroad, or improvement authorized hereby, by causing the clerk of the court when the report of said commissioners is filed and confirmed, and the award of damages is paid, to make certified copies of such report or any part thereof, so far as it affects or relates to any real estate or interest therein, situate in any county through which said improvement runs, and such certified copy, ac-

companied by a map showing the location of the land taken, when recorded in the office of the register of deeds of the county in which such real estate is situated, shall be effectual to fully pass title to such real estate or the interest therein taken by said commissioners to said corporation, and such record shall be notice to all parties of the title of said corporation therein, and such record may be read as evidence of such title in all the courts of this state, except in cases where valid appeals are taken from the report of said commissioners, and in such cases the judgment of the court upon such appeal, after the damages are paid may be recorded in the office of the register of deeds of the county where the said real estate or interest therein, and affected by said judgment, is situated, and such record shall be notice and evidence of title in like manner and effect as the record of certified copies found in said report.

Sec. 28. Any telegraph corporation organized under this title, has power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or fixtures; *provided*, that the same shall be so located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads or highways.

Sec. 29. If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley or public way, or any part thereof, it shall be competent for the municipal or other corporation

or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals.

Sec. 30. For the purpose of making preliminary surveys and examinations over and upon any contemplated route, such corporation, its agents, servants or employes, may enter upon land, doing no unnecessary damage.

Sec. 31. Any corporation organied under this title is authorized to obtain by purchase, gift or contract, all the rights of way, tow-paths, flowage and property hereinbefore provided for, and hold all property, real and personal, necessary and convenient for the successful prosecution of the enterprise.

Sec. 32. Whenever any railroad corporation, whether incorporated under this title or by a special charter, deems it necessary to extend its line of road across any navigable waters of this state, it has power to construct such bridges as may be required for the purposes of said road across such navigable waters, and to repair and maintain the same in such manner as may best subserve the interests of such corporations: *provided*, that such bridge shall not be constructed in a manner to ob-

struct or impede, in any wise, the free navigation of said waters.

Sec. 33. Every corporation organized under this title shall erect, at all points where their road crosses any public road, at a sufficient elevation from such public road to admit of a free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons of the necessity for the looking out for the cars; and any company neglecting or refusing to erect such sign, shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal; and each railroad company shall fence its roads with a good substantial fence, under such rules as the county commissioners of the several counties through which the same may run, prescribe.

Sec. 34. Every railroad corporation organized under this title shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such corporation as a station for receiving passengers upon such trains, at least one minute; and also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods before each arrival at the crossing of any other railroad; and every corporation, and every person in the employment of such corporation that violates, or causes, or permits to be violated, the provisions of this section, is liable to a forfeiture of not more than one hundred dollars, nor less than twenty dollars, to be recovered in a

civil action before any justice of the peace of the county in which such violation occurs, upon the complaint of any person, one-half to go to the complainant and the remainder to the use of common schools in the county; and such company is further liable in the full amount of damages done to property or person in consequence of any neglect on the part of its agents or employees to comply with the requirements of this section; and in all cases in which a forfeiture occurs under the provisions of this section, the company, whose agents cause or permit such violation, shall be liable for the amount of such forfeiture, and in all cases the conductor upon such train shall be held *prima facie* to have caused the violation which may occur upon the train in his charge.

Sec. 35. Such corporation may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile, and for the transportation of property, not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said corporation or prescribed by law.

Sec. 36. Whenever the lines of railroad of any railroad corporation whether organized under this title or by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads continu-

ously without break or interruption, such corporations may consolidate themselves into a single corporation in the manner following:

First. Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the names and places of residence and number of the directors thereof; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share, which shall not be less than one hundred dollars; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; the manner of compensating stockholders in each of the old corporations, who refuse to convert their stock into the stock of the new corporation; with such other details as they deem necessary to perfect the consolidation of said corporations; and such new corporation shall possess all the powers, rights and franchises conferred upon said corporations, and be subject to all the restrictions and perform all the duties imposed by the provisions of this title: *provided*, that all stockholders in either of such corporations who refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they so re-

quire, previous to the consummation of said consolidation.

Second. Such agreement of the directors shall not be deemed to be the agreement of the said old corporations, until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof, to be called upon a notice of at least thirty days; specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal office of business; and is sanctioned by such stockholders by the vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately, it shall be deemed to be the agreement of the said old corporations.

Sec. 37. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counter-part thereof in the office of the secretary of state, the said old corporations shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned; and the

details of such agreement shall be carried into effect, as provided therein.

Sec. 38. Upon the election of the first board of directors of the corporation created by said agreement, the rights and franchises of each of said old corporations, their rights and interests in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said old corporations had continued to retain the title, and transact the business of such corporation; and the titles and real estate acquired by either of said old corporations, shall not be deemed to revert or be impaired by means of anything in this title contained: *provided*, that all rights of creditors, and all liens upon the property of either of said old corporations, shall be preserved unimpaired; and all the debts, liabilities and duties of either company, shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties, had been originally incurred by it.

Sec. 39. Any railroad corporation heretofore or hereafter incorporated, whether under the provisions of this title or by special charter, may at any time, and by means of subscription to the capital of any other corporation, or otherwise, aid such

corporation in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the corporation furnishing said aid; or any railroad corporation, may lease or purchase any part or all of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, upon such terms and conditions as may be agreed on; or any two or more railroad corporations whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; *provided,* that no such aid shall be furnished, nor any purchase, lease or arrangement perfected, until a meeting of the stockholders of each of said corporations has been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the stockholders of at least two-thirds of the stock of such corporation represented at such meeting, in person or by proxy, and voting thereat, assent thereto.

Sec. 40. Such corporation has the power to borrow money on credit of the corporation, and may execute bonds or promissory notes therefor, and to secure the payment thereof, may pledge the property and income of said company: *provided,* that the amount of the indebtedness or liability of such company shall not at any one time exceed two-thirds of the amount of its capital stock nor the amount to be specified in the certificate hereinbefore provided for.

Sec. 41. The corporators named in the articles hereinbefore provided for, are authorized, at their first annual meeting, or at such other time as they deem best before such annual meeting to be designated by them, to open books for subscription to the capital stock of said corporation under such regulations as they shall prescribe, and when after the opening of books for the subscription of stock, sufficient stock is subscribed to justify the incorporators or directors to commence such canal, line, railroad or improvement, and the first installments upon such stock are paid in, said corporation may commence work thereon, and they shall thereby become invested with all the rights, privileges and franchises conferred by this title.

Sec. 42. Whenever any corporation created and incorporated under the provisions of this title, or adopting its provisions as hereinbefore provided, shall, in the opinion of the directors thereof, require an increased amount of capital stock, or other modification of their articles of association, not inconsistent with the provisions of this title, they shall, if authorized by the holders of a majority of the stock, file in the office of the secretary of state, new articles, setting forth the modifications of their said articles of association proposed, and the amount of such desired increase of stock, if any, which said new articles shall be duly recorded and a reference made to the same on the margin of the record of the original certificate or articles, and thereafter such corporation shall be entitled to have such increased capital as is fixed by said new arti-

cles, or such other modification of the original articles of association as shall be therein specified.

Sec. 43. Every railroad company incorporated under this title, shall annually, in the month of January, make a full report of the condition of its affairs, to the auditor of state, showing the amount of the capital stock in such company, the gross amount of tolls or receipts during the previous year, the costs of repairs and incidental expenses, the net amount of profits and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such road; and the auditor of state shall annually present an abstract copy of such report to the legislature.

Sec. 44. The diversion of corporate property to other objects than those specified in the articles and notices published as aforesaid, (if any person is injured thereby), the declaring of dividends when the profits are insufficient to pay the same, the payment of dividends when the funds remaining will not meet the liabilities of the corporation, any willful failure to comply with the articles of incorporation, or any intentional deception of the public or individuals in relation to their means or liabilities, are criminal offenses, and persons guilty of any of them may be indicted, and on conviction, shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the state prison not more than three years, or both such fine and imprisonment, in the discretion of the court.

TITLE II, OF CHAP. 34, REVISION 1866.

OF CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE I.

Sec. 45. Any number of persons not less than three, who shall, by articles of agreement in writing, associate according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting, or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical or chemical business, and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association; *provided*, no company shall take a name previously assumed by any other company.

Sec. 46. The provisions of sections two, three, four, seven, eight, nine, ten, eleven and forty-four of title one, shall apply to and be observed by corporations organizing under this title.

Sec. 47. The amount of capital stock in every such corporation shall in no case be less than ten thousand dollars, nor more than five hundred thousand dollars, and shall be divided into shares of fifty dollars each; but the capital stock and number of shares may be increased at any regular meeting of the stockholders; *provided*, the amount of capital when so increased, shall not exceed the sum of five hundred thousand dollars.

Sec. 48. Every such corporation has power to acquire, hold and transfer all such real and personal estate as is necessary or convenient for the purpose of conducting, carrying on, or disposing of the business of such corporation.

Sec. 49. The stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation in such form as the directors prescribe, and such corporation shall at all times have a lien upon the stock or property of its members invested therein for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided for selling delinquent stock.

Sec. 50. The directors shall cause a record to be kept of all stock subscribed and transferred, and of all business transactions, and their books and records shall at all times be open to the inspection of any and all stockholders; they shall also, when required, present to the stockholders reports in writing of the situation and amount of business of the corporation, and declare and make such dividends of the profits, from the business of the corporation, not reducing the capital stock while they have outstanding liabilities.

Sec. 51. The directors of any corporation organized under this title have power to establish one or more offices without this state, and transact business thereat; *provided*, that an office shall always be maintained in this state where legal process may be served on the person in charge thereof.

Sec. 52. No corporation shall be formed under this title to continue more than thirty years.

Sec. 53. Mutual insurance companies, organized under the provisions of this chapter, may render their premium notes a lien upon the whole or any part of the real estate upon which the property insured is situate, whether such real estate is or is not exempt from other liabilities as a homestead; but such lien shall not attach until the premium note stating the property on which it is a lien is filed for record and treated in the same manner as though it were a mortgage from the maker thereof to the company, except that it need not be acknowledged; *provided*, that no fire insurance company organized within this state, nor any agent thereof, shall transact any business of fire insurance within this state, unless such company is possessed of at least twenty-five thousand dollars in cash, or in value other than risks, of actual capital above all debts and liabilities, invested in stocks, or bonds, or mortgages on real estate worth double the amount for which the same is mortgaged. The provisions of sections 117, 118 and 120, of title 6 of this chapter shall extend and apply to all insurance companies organized under the laws of this state; *provided further*, that it shall be the duty of the county attorney in each county where such company is situated, upon complaint of two or more members of such association or company, or persons insured therein, to examine at any time into the financial condition of such company and if in his opinion such company does not possess the amount of cap-

ital on hand, according to the requirements of the law, or in other material things are not complying with the law, he shall so certify to the state treasurer, who, upon the report of such certificate from the county attorney, shall cancel the certificate issued to said company under sections 114 and 117, of title 6, in this chapter, and the treasurer of state shall so notify said company immediately that their certificate is cancelled; *provided further*, that the liability referred to in this section shall not be construed to refer to the risks taken by said company; *provided further*, that mutual insurance companies organized under the laws of the state of Minnesota, may do business in the county where organized, and there only, without having the capital required in this act (title).

AMENDMENT TO TITLE II, OF CHAPTER 34, REVISION OF 1866.

CHAPTER 23, LAWS OF 1868.

"CHAPTER XXIII.

An Act to amend section forty-five, of chapter thirty-four, of the General Statutes, relating to corporations.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section forty-five, of chapter thirty-four, of the general statutes, be amended so as to read as follows:

Section 45. Any number of persons, not less than three, who shall, by articles of agreement in writing, associate according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting, or manufacturig iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural mechanical, chemical, insurance or transportation business, and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of associations; *provided*, no company shall take a name previously assumed by any other company.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 4, 1868."

AMENDMENT TO TITLE II, OF CHAPTER 34, REVISION OF 1866.

CHAPTER 13, LAWS OF 1873.

"CHAPTER XIII.

An Act to amend section forty-five, title two, of chapter thirty-four of the general statutes, relating to corporations.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section forty-five, title two, chapter thirty-four, of the general statutes, be and

the same is hereby amended so as to read as follows:

Sec. 45. Any number of persons not less than three, who have or shall, by articles of agreement in writing, associate according to the provisions of this title under any name assumed by them for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing iron, copper or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate or other mineral substance, or for constructing, leasing or operating docks, warehouses, elevators or hotels, or as a mutual savings fund, loan or building association, manufacturing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercatile, chemical, transportation or other lawful business, and who have or shall comply with the provisions of this title, shall with their associates, successors and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement.

Provided, No company shall take a name previously assumed by any other company. Any mutual saving fund, loan or building association, as authorized to loan funds and to secure such loans by mortgage or other security, and any premiums taken by any such association for the preference or priority of such loans shall not be deemed interest within the meaning of section one of chapter twenty-three of the general statutes. Any such association is authorized and empowered to pur-

chase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate, upon which such association may have or hold any mortgage, judgment or lien, or other encumbrance, or in which such association may have an interest and the real estate so purchased, to sell, convey, lease or mortgage at pleasure, to any person or persons whatsoever.

Approved March 10, 1873."

CHAPTER 17, STATUTES OF MINNESOTA 1849-1858, page 319.

"RAILROAD COMPANIES.

An Act to provide for the Incorporation and Regulation of Railroad Companies.

Sec. 1. Be it enacted by the legislature of the state of Minnesota: That any number of persons not less than five associating for the purpose of constructing a railroad, shall subscribe a statement which shall specify as follows:

1st. The name assumed by such company, and by which it shall be known.

2d. The name and place of residence of each of the persons forming the association.

3d. The name of the place or places of the termini of said road, and the county or counties through which said road shall pass.

4th. The amount of capital necessary to construct said road. Such statement verified by the

affidavit of two or more of the persons therein, shall be acknowledged before some one authorized to take the acknowledgment of deeds, and certified by the clerk of the district court, and filed in the office of the secretary of state, to be by him recorded in a book kept for that purpose, and the original, or copy thereof, duly certified by the secretary of state, shall be evidence of the existence of such company."

This act has twenty-five sections, all relating exclusively to railroads.

Section 9 of the act authorizes railroads to exercise the right of eminent domain in order to secure right-of-way for sidetracks, depots, workshops, water stations and materials for construction.

Substantially all of these sections were embodied in Title 1, Chapter 34, Revision of 1866.

On pages 330 to 334, both inclusive, Statutes of Minnesota 1849-1858, are general provisions, relating to corporations, passed August 12, 1858. The title is as follows:

"OF CORPORATIONS FOR PECUNIARY PROFIT.

Sec. 1. Be it enacted by the legislature of the State of Minnesota:

Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, railways, telegraphs, bridges or other works of internal improvement; but such incorporation confers no power or

privilege not possessed by natural persons, except as hereinafter provided."

This chapter contains thirty-five sections, but no provision for the exercise of the right of eminent domain.

In the Revision of 1866, the incorporation of companies for the construction of canals, railways, telegraphs and works of internal improvement, which require the taking of private property or an easement therein, were put into Title I, Chapter 34; while all other corporations organized for pecuniary profit were provided for by Title II of said Chapter 34.

CHAPTER 350, LAWS OF 1899.

Chapter 350.

An act providing for condemnation of right of way by street railway companies in certain cases.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Any corporation organized under the laws of this state, for the purpose of constructing a street railway in this state, wholly or partly without the limits of any city or cities, shall have the right to acquire and occupy private right of way throughout any portion of its route outside the limits of any city or cities, whenever deemed necessary by such corporation, and for that purpose shall have the power to exercise the right of eminent domain, including the crossing of intervening highways when necessary, and the provisions of Sec-

tions twenty-six hundred and five (2605) to twenty-six hundred and sixteen (2616), both inclusive, and section twenty-six hundred and forty-two (2642), Statutes of Minnesota, eighteen hundred and ninety-four (1894), so far as consistent herewith, shall apply to and govern the exercise of such right.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved April 20th, 1899."

SECTION 2842, REVISION OF 1905, is as follows:

"2842. STATE AND LOCAL CONTROL—EMINENT DOMAIN—The state shall at all times have the right to supervise and regulate the business methods and management of any such corporation, and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire, by right of eminent domain, such private property as may be necessary or convenient for the transaction of the public business for which it was formed: *Provided, that no street railway company shall have or exercise such right within the limits of any city or village.*"

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JAMES H. McKEN

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 46.

THE CITY OF MINNEAPOLIS,

Appellant,

vs.

MINNEAPOLIS STREET RAILWAY COMPANY,

Appellee.

Appellant's Brief in Reply.

FRANK HEALY,
City Attorney and Solicitor for Appellant.

WM. A. LANCASTER,
JOHN F. McGEE,
Of Counsel for Appellant.

Review Publishing Company, Minneapolis, Minnesota

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Appellee.

Appellant's Brief in Reply.

Appellee's counsel have prepared and filed in this case, two briefs which seem to cover the same propositions.

There is, moreover, but little difference between the briefs in the treatment of these propositions.

The briefs were prepared after Appellee's counsel had been furnished with copies of Appellant's brief.

It seems to us that counsel (except as to some of the questions involved in the first proposition) have neither fairly stated nor squarely met and discussed the points which we have sought to make in our brief.

We have, therefore, deemed it advisable, if not necessary, to prepare and file this reply and supplemental brief.

We wish first to acknowledge an error into which we fell in our brief, to which Appellee's counsel have referred on bottom of page 43 and top of page 44 of Mr. Munn's brief.

At the time the statement was made to the effect that railway companies in the State of Minnesota were organized under special charters prior to 1881, we did not have in mind article 2 of Section 10 of the Constitution of Minnesota. That section reads as follows:

> "No corporation shall be formed under special acts, except for municipal purposes."

Prior to the adoption of the constitution, many special charters to commercial railroad companies had been granted by the Territory of Minnesota. At almost every session of the legislature down to the year 1881, amendments of all kinds were made by the legislature to these various territorial charters, without regard to the effect which article 2 of

Section 10 of the State Constitution might have upon their validity.

Several of these railroads organized under the territorial charters were also consolidated prior to 1881 under special acts of the legislature.

While the statement which we made is not literally correct that new railroad corporations were, in fact, *organized* under special acts of the legislature prior to 1881, yet in practical effect the statement is substantially true, for the reason that effectual use was made of the territorial special charters by these various amendments, which, for practical purposes, amounted to special charters.

This was the condition until the adoption of the amendment to article 4 of the constitution in 1881. By this amendment "the legislature is prohibited from enacting any special or private laws in the following cases * * * 7. For granting corporate powers or privileges except to cities."

In the case of *Green v. Knife Falls Boom Corporation*, 35 Minn. 155, it was held that under the original provision of the Constitution, the legislature was not prohibited from amending special charters; while under the later amendment of 1881, the Supreme Court recognized a change of policy, and held that a strict rule of construction should be

held to apply to all subsequent legislation in any way affecting or amending or extending the charters of existing corporations.

The Court there said, in speaking of the amendment of 1881:

> "Its language and meaning are too clear to call for construction, and there will be no ground upon which to build any subsequent erroneous legislation or popular construction."

This decision to which we have called the attention of the Court, shows how the practice had sprung up and been continued from the adoption of the constitution to 1881, of amending, extending, consolidating and practically re-making the old territorial special charters. This, in fact, was the uniform practice of railroads in the State up to the time when the amendment of 1881 was made to the constitution.

While it is true that we did not have in mind the earlier provision of the constitution, it is still true that for all practical purposes railroads were, in fact, prior to 1881, constructing, operating and maintaining their roads under special charters granted by the Territory of Minnesota, and most liberally amended, extended and consolidated by special acts subsequent to the admission of the

State and the adoption of the constitution and prior to the year 1881.

On top of page 44 of Mr. Munn's brief, counsel says:

> "We call attention to these errors of Counsel, not in a spirit of captious criticism, but for the purpose of showing the fallacy which exists in the foudation upon which they largely build their argument on this branch of the case."

We think it will be seen at a glance that the error in our statement does not affect in the slightest degree the validity of our argument upon the point in question. The statement was merely incidental and in no respect vital.

I.

Appellee's counsel in both briefs repeatedly assert that,

(*a*) *The Minneapolis Street Railway Company could not have been organized under Title II of Chapter* 34 *Revision of* 1866 *as amended; and that,* (*b*) *It could be and was organized only under Title I of said Chapter, first, as a railroad, and, second, if not as a railroad, then as a work of internal improvement, which requires the taking of private*

property or any easement therein; and (c) *That the decisions of the Supreme Court of Minnesota have recognized the right of street railway companies to be organized under Title I,* and (d) *Their right to exercise the power of eminent domain;* and (e) *That they have held that street railway companies and other public service corporations could be organized under Title I of said Chapter* 34, *Revision of* 1866.

We proceed to demonstrate the absolute incorrectness of each of these contentions **by reference to and quotations from, the decisions** of this State.

That the term "railroad" or "railway" as used in our statutes has never been held to include **street railway or street railroad** has been many times, and most emphatically, asserted by our Supreme Court (see pages 29 to 33, Appellant's brief and cases there cited).

Against these positive and emphatic constructions of our various statutes, as shown by the decisions cited, we have nothing in counsel's briefs but their own assertions. **There is not a single Minnesota case cited by them which even squints at a different construction.**

A. On page 42 of Mr. Munn's brief we find this positive and sweeping statement:

"The Supreme Court of Minnesota recognized the right of a street railway company to exercise the power of eminent domain in the case of *Carli v. The Stillwater Street Railway Co.*, 28 Minn. 373, where the Court said, at page 377:

"'It (the company's line) is built partly upon the alley and partly upon property acquired for the purpose from private owners by condemnation and purchase.'"

Counsel have contented themselves with this bare quotation without any suggestion as to what was, in fact, decided by that case and without referring to the connection in which the quotation was used.

By an examination of the case, it will be found that there is not a single suggestion throughout either the statement of facts or the decision as to what kind of a corporation the defendant was. **It is nowhere suggested that it was organized as a street railway company under either Title I or Title II. The fact is, the case is absolutly silent upon the point, and no reference is anywhere made as to the character of this corporation.** What the Court was called upon to decide was simply whether or not a railroad laid in the alleys of Stillwater between two commercial railroads and used merely for the purpose of hauling freight cars from the terminus of one railway line to another, by horses was an additional burden upon the street, and the Court held that it was.

There is, in the case, a discussion as to the distinction between a street railway company pure and simple, which is for the purpose of carrying passengers and taking them from the street and de-

livering them at other places upon the street, and those roads which simply use the streets as a roadbed for through traffic, either of passengers or of freight.

On page 377 of the report, the Court, in passing, uses the language which counsel has quoted. It is in this connection:

> "By reference to the findings of the court, it appears that the principal, if not the only purpose of the track now constructed and proposed to be maintained and operated, is for a transfer track between two lines of railroad running into the city of Stillwater. It connects these lines, which terminate in different parts of the city. **It is built partly upon the alley, and partly upon property acquired for the purpose from private owners by condemnation and purchase.** It has never been used, and it is not proposed to use it, to carry passengers. Its only use, so far as appears, is to transfer freight cars, of the kind ordinarily used on railroads, from the terminus of one railroad to that of another railroad. It is not proposed, as the reason and object of its existence, to receive freight at any point on the street or alley, or to deliver freight at any point thereon."

This is the **gist** and **substance** of the decision, and the question as to the right of a street railway company to exercise the power of eminent domain is neither **suggested** nor **decided** in the case. It was not, and from the very nature of the action could not, have been involved in it. Furthermore, it is distinctly held that the **railroad** in question was **not a street railway.** If there is any doubt upon this point, the case to which reference has been so often

made, to-wit, *Minneapolis & St. Paul Suburban Street Railway Company v. Manitou Forest Syndicate,* 101 Minn., page 132, completely settles the question.

On page 146 of the opinion in the latter case, the Supreme Court of Minnesota said:

> "In *Carli v. Stillwater St. Ry. & T. Co.,* 28 Minn. 373, it was held that the construction and maintenance of a railroad operated by animal power upon a public street, for the main purpose of transferring freight cars between the termini of railroads, is the imposition of an additional servitude upon the street, so as to entitle the owner of a servient estate to compensation. **The court held that it was not a street railroad, because its primary purpose was not for the accommodation of the public,** etc."

B. Following this statement, to which we have just called attention, counsel make the following assertion (see page 42 of Mr. Munn's brief):

> **"Telephone companies are nowhere mentioned in the legislation of Minnesota prior to the adoption of said amendatory act of 1893, when they are referred to in the same manner as street railway companies in that amendment; and yet, the Supreme Court of Minnesota has repeatedly held that a telephone company can exercise the power of eminent domain."**

Counsel are completely in error with reference to the foregoing statement. As early as the year 1881, Chapter 73 of the General Laws of 1881 was passed by the Legislature, which amended Section 42 of Title I, Chapter 34, General Statutes of 1878, by inserting the word "telephone" immediately after the word "telegraphs."

By an examination of Section 1 of Title I, Chapter 34, Rev. 1878, it will be seen that telegraph companies are expressly included among the kinds of corporations that may organize under that Title. Section 42 of that chapter expressly provides that telegraph and telephone corporations organized under that Title, are authorized to make use of the public roads and highways in the State for the purpose of setting their poles and stringing their wires.

Furthermore, a telegraph company being organized under said Title I is expressly given the power of eminent domain. The Supreme Court of Minnesota, in the case of *Northwestern Telephone Co. v. Chicago, Milwaukee & St. Paul R. Co.*, 76 Minn. 334 (in 1899), flatly held that a telephone company was within the meaning of the word "telegraph," as it appeared in Section 1, of Title I, Chapter 34, Revisions 1866 and 1878, and was entitled to all the benefits, privileges and immunities of a telegraph company, including the right to exercise the power of eminent domain.

It will thus be seen that before the Supreme Court of the State of Minnesota was called upon to construe the meaning of the word "telegraph" as used in Section 1 of Title 1, Chapter 34, Revisions of 1866, 1878 and 1894, Sections 28, 42 and 2641 of Title I had been amended so as to expressly include telephone companies.

C. Again, on page 43 of Mr. Munn's brief, counsel after quoting from our brief to the effect that there is not a single suggestion in any of the de-

cisions of this State to the effect that **street railways** have ever been invested with a **general power of eminent domain,** says:

> "Counsel for the City, evidently are not familiar with all the decisions of the state. We call attention to the case of *Minnesota Canal & Power Co. v. Pratt,* 101 Minn. 214, where the court said:
>
> "'Railway corporations were recognized as public service corporations and granted the right of eminent domain in this and other states long before there were any statutes to regulate the conduct of their business or to fix the rates which they might charge. **Street car companies, telegraph and telephone companies, and gas and electric light companies were recognized as public service corporations and given the power of eminent domain under similar conditions.'"**

Counsel assumes that this statement is in direct conflict with the one which he has quoted from our brief. In the first place, what we said was that there was not a single suggestion in any of the decisions of the State of Minnesota to the effect that street railways had ever been invested with the **general** power of eminent domain. That statement we again repeat; and furthermore we assert that not a single thing in Appellee's briefs or in the case cited militates against the absolute truth of the statement.

The decision in *Minnesota Canal & Power Co. v. Pratt,* 101 Minn. 214, was rendered on June 7, 1907, more than two years after the **Revision of 1905** had been passed by the Legislature and more than **one and a half years after the same had gone into effect.**

By the Revision of 1905, Sections 2841 and 2842, street railways were expressly mentioned and given **a qualified right to exercise the power of eminent domain in certain cases, as also were gas companies.** And as early as 1899, Chapter 350 of the General Laws of that year provided in express terms for the exercise of the power of domain by street railway companies **outside of cities and villages.** These are undoubtedly the provisions (for there certainly are no others) to which the Court is referring when it says that street railway companies have been invested with the power of eminent domain.

Chapter 350 of the Laws of 1899 and the provisions now appearing in the Revision of 1905 are the only provisions of the statutes of Minnesota which either **expressly** or by **implication confer any right, even a qualified one,** to exercise the power of eminent domain, **upon street railway companies.** Upon this point there can be no possible question of difference in this case. We have carefully examined all of the statutes and have been able to find none, nor do counsel suggest any.

D. Appellee's counsel in Mr. Munn's brief, on page 40, have placed in parallel lines the language of the first three sections of the articles of incorporation of the Duluth Street Railway Company and the Minneapolis Street Railway Company, and then call the attention of the Court to the case of *State v. The Duluth Gas & Water Co.*, 76 Minn. 107, wherein it is stated:

> "The Duluth Street Railway Company was organized under General Statutes 1894, Chapter 34, Title I, and the acts amendatory thereof."

As will be seen by reference to this case, the question of whether the company was, in fact, organized under one title or the other was in no way involved, in the controversy. It was solely and simply a question of whether or not, in fact, it was operating, at the time in question, a **railroad** within the meaning of the laws of Minnesota for the year 1887, to-wit, Chapter 11 thereof, with reference to taxation on a **basis of gross earnings.** Incidentally in referring to the corporation, on bottom of page 107, it says that it "was organized under General Statutes 1894, Chapter 34, Title I, and the acts amendatory thereof." It then proceeds to state the general nature of its business, showing that it was, in fact, a **suburban** as well as an **urban** railway. It also recites the fact that in 1881 by special laws, extra session, Chapter 200, certain additional rights were conferred upon this company.

On page 108 of the opinion, after commenting upon what the company was authorized to do according to its articles of incorporation, the Court said:

> "While the defendant may possess some unexercised powers not ordinarily conferred upon street railway companies, yet it is perfectly apparent that it is in all essential respects a 'street' and not a 'commercial' railroad. Therefore the gross earnings tax law of 1887 does not apply."

These are the cases which counsel insist recognize the right of a purely street railway company to organize under Title I of Chapter 34, Revision of 1866 and the consequent right to exercise the power of eminent domain.

E. Appellee's counsel assume that if the Minneapolis Street Railway Company is an **internal improvement,** then, of course, the company was properly organized under Title I.

Throughout the argument of counsel, in both briefs, they are repeatedly referring to the words **"internal improvement"** as though these were the only requirements of Section 1, Title I, Chapter 34, Revision of 1866. The fact, however, is that the language there used is, **"works of internal improvement which require the taking of private property or any easement therein." These last words are almost invariably omitted by counsel.**

They assume that street railways and gas companies and electric light and power companies are all in the same class, and that they are all internal improvements, and that they are, and always have been, invested with the power of eminent domain.

Never, until the Revision of 1905, when, as the Supreme Court held in the *Minneapolis & St. Paul Suburban Street Ry. Co.* case, 101 Minn., the old Titles were abandoned, and a complete consolidation of all kinds of corporations was made, did these companies appear as public service corporations, entitled to the right of eminent domain (see discussion of Appellee's counsel on pages 14, 15 and 16 of Mr. Munn's brief).

As before stated, counsel assume that gas companies, electric light and water power companies must, of necessity, be organized under Title I. And yet the decision of the Supreme Court in the case of *Minneapolis & St. Paul Railway Co.*, 101 Minn. 132, **is directly to the contrary.** It is there stated in express languags as follows (see middle of page 148):

> "While no doubt the construction and operation of electric and lighting plants is a business which might be organized under the provisions of Title II, and conceding there was no statutory authority for the purchasing by one corporation of another line of street railway, or stock therein, yet these purposes seem to be merely incidental to the main purpose, as expressed in the articles considered as a whole."

It will be remembered that in discussing this matter, the Court is there dealing with a corporation which was organized in June, 1899, and the Court held with reference to those things which were stated in the articles, that a corporation for such purposes, to-wit, electric and lighting plants, could be organized under the provisions of Title II. Of this we apprehend there has never been a doubt among the profession.

The Minneapolis General Electric Company, a very large and prosperous lighting and power company of Minneapolis, was organized on September 1, 1892, under the laws of Minnesota, and in the articles it is expressly stated that it is organized under and pursuant to Title II of Chapter 34 of the General Statutes of 1878.

F. There is only one decision in the State of Minnesota wherein the question of whether a corporation was organized under Title I or under Title II was, in fact, involved, and wherein this question was actually determined, and that case is the one to which we have already called attention,—*Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate,* 101 Minn. 132. That case decides two propositions which, it seems to us, are absolutely determinative of the question here under discussion.

First. It holds that a street railway company pure and simple, may be and should be organized under Title II, Chapter 34; and,

Second. That such a company never had, prior to the passage of Chapter 350, General Laws of 1899, any right to exercise the power of eminent domain.

On page 142 the Court said:

> "The solution of that question" (to-wit, the right of the company to exercise the power of eminent domain) "calls for the consideration of two propositions:
>
> First, **As originally incorporated, was the company endowed with the right of eminent domain?**
>
> Second, if it was, then was the power to exercise it within the limits of cities and villages denied by subsequent statutes?"

It will be seen at a glance that if the present contention of Appellee's counsel (and they were counsel for the plaintiff in the case under consideration) is correct, the first question stated by the Court would be **absolutely immaterial,** because

whether it was a **street railway company or a suburban railway company** would be wholly immaterial, inasmuch as it would still be a railway company or a work of internal improvement, as claimed by counsel, and, consequently, organizable only under Title I, of said Chapter 34.

There could be no possible purpose in the extended discussion of the Court in that case except upon the theory that if the plaintiff company there was **merely a street railway company,** it was properly organizable under Title II; but if it was not merely a street railway company but in addition thereto principally a suburban railway company, it was properly organizable under Title I. But now the same counsel contend that whether it was one kind of a railway or another kind is wholly immaterial. It is in either event a **railway or a work of internal improvement, or both,** and a **public service corporation** and could only be organized under Title I.

Again on page 144 the Court says:

> "If appellant was in fact incorporated for the construction, maintenance and operation of a work of internal improvement, as provided by Title I, then it possessed the right of eminent domain, unless otherwise restricted."

This statement would be wholly immaterial if counsel's present contention is correct that whether a street railway or a suburban railway or a commercial railway or any or all of these, it must still be organized under Title I. But, it seems to us, on page 150 of the opinion just referred to, the Court has completely disposed of the question here involved. It there said:

"Some confusion grows out of the fact that chapter 58, R. L. 1905, is a consolidation of Titles I and 11, c. 34, G. S. 1894, but the revisers and the legislature expressly declared by section 2838 that all existing rights were continued until otherwise provided by law. Whatever powers appellant company possessed under Title I were continued, unless the contrary appears. In section 2593, G. S. 1894, street railways were not specifically mentioned; **but the right of eminent domain was conferred upon such roads outside of cities and villages by chapter 350, p. 461, Laws 1899.** This chapter was expressly repealed by Revised Laws, 1905; but the right to exercise the power was reversed to such companies by section 2841, where street railways are designated as works of internal improvement, and by section 2842 and section 2926, where the right of eminent domain is expressly conferred upon all such corporations. We discover nothing significant in the fact that the Revised Laws add 'street railways' to the list of public service corporations with the right of eminent domain, and at the same time prohibit their exercise of the right within cities and villages by the proviso in section 2842. These provisions for the exercise of the right of eminent domain by street railways without the limits of cities and villages do not warrant the inference that it was the intention to withhold the right from corporations operating in the country lines of the street railway type, in other words, to wipe out the distinction theretofore existing between commercial and street railroads, except in cities and villages."

The foregoing shows, in express terms, that the right of eminent domain, and that, too, only in a qualified degree, was first conferred upon street railways by Chapter 350, Laws of 1899. **And as we have before stated, no suggestion or intimation**

in any decision of the Supreme Court of the State of Minnesota can be found to the effect that prior to that time a street railway company had even a qualified right to exercise the power of eminent domain.

G. Again, the Supreme Court of Minnesota in the case just cited, holds that a street railway company pure and simple, may be properly organized under Title II. From pages 145 and 146 of the opinion we quote the following:

> "Although the articles state that it is the purpose of the company to purchase, lease, build, own and operate street railways, the word **'street'** is not significant, because the context shows that the articles do not refer to **that class of railways.** The railways described in the articles are suburban railways, extending from the city limits of St. Paul and Minneapolis to and into outlying cities, towns and villages within the state of Minnesota, viz: From St. Paul to North St. Paul, White Bear and Stillwater; from St. Paul to South St. Paul; from Minneapolis to Anoka; and from Minneapolis to Lake Minnetonka. That district which lies adjacent to and outside the city limits is 'suburban.' **The proposed railways are to run from the limits of the cities to distant cities and villages, through land where there are no streets; and hence the word 'street' was not used in the articles for the purpose of limiting the corporation to the provisions of Title II. This becomes more apparent when we consider the characteristics of the two classes, commercial and street railways."**

Nowhere in the discussion of counsel throughout the two briefs which they have filed, is there any reference to this pertinent language of the Court

in this recent case, wherein the precise question which we are here discussing was directly involved.

One of the main reasons why counsel insist that the Company was organized under Title I is because (they say), it could not be organized under Title II. And yet the Court here holds in effect and by necessary implication that a street railway company pure and simple could be properly organized under Title II. Furthermore, in the case from which this quotation has just been made, the same counsel here appearing for the Appellee, impliedly, if not expressly, conceded that a street railway company could be organized under Title II. And right here it is not out of the way to call attention to the fact that the Minneapolis & St. Paul Suburban Street Railway Company was organized in June, 1899, by Thomas Lowry, C. G. Goodrich, the then President and Vice President of the Minneapolis Street Railway Company, and by **M. B. Koon** and **M. D. Munn** (both counsel in this case, and for many years attorneys and counsel of this Appellee), with one other incorporator, J. F. Calderwood.

In the year 1899, these incorporators, **three of them lawyers,** and two of them **active practitioners,** organized that corporation and expressly stated in the articles that the same was organized under and pursuant to the provisions of Title II, of Chapter 34, Statutes of 1894. And yet these lawyers have persistently urged in this case that it has never been maintained that street railway companies could be organized under anything else than Title I, Chapter 34, Revisions of 1866, 1878 and 1894.

They evidently considered at the time they organized that corporation that it was properly organizable under Title II. They did not find out that it should have been organized under Title I until they found it necessary to exercise the right of eminent domain. And when they so found it necessary, they sought to bring it under the provisions of Title I, **by showing that the purposes of the corporation were not those of a mere street railway, but, in fact, of a suburban railway, necessarily requiring the exercise of the right of eminent domain, not being confined to streets.**

H. In both briefs of Appellee's counsel, some point is attempted to be made of the fact that in the complete revision of the Statutes of Minnesota for the year 1905, street railways are specifically mentioned in Section 2841 as public service corporations, together with railways, telegraph, telephone, gas, water, electric light and power companies. From this fact they would infer that street railway companies **always** belonged under this heading, along with railways, telegraph, canals, slackwater and other navigation. But it will be seen at once that such inference is unjustifiable. Neither gas nor electric light nor water companies were ever placed in this class until the Revision of 1905,—the Supreme Court in the Minneapolis & St. Paul Suburban Railway Co. expressly saying that such companies could be organized under Title II.

The Revision of 1905 as to corporations was radical and complete in almost every detail, relating to their organization, powers and duties, and very little in the revision of that chapter can be legitimately used as a legislative declaration of what the law was prior thereto.

In Section 2856 it is provided that railroad corporations may be formed for any period specified in their certificates of incorporation, **while all other corporations may not organize for a period exceeding thirty years.**

Counsel certainly would not contend that the word "railroad" as there used means anything more than commercial railroads, for in that chapter railways are specifically mentioned, as also street railways, while again in Section 2891, railroad corporations are referred to in such a way as to leave no doubt that the term "railroad" alone is used with reference to commercial railroads. The distinction between railroads and street railroads is marked throughout the entire chapter wherever those terms are used. The only place where they are included under the same head, though separately enumerated, is where they are designated as public service corporations.

In Section 2842 where the power of eminent domain is conferred upon such corporations, it is expressly provided that street railways can neither have nor exercise such right within the limits of any City or village. This provision is strictly in harmony with Chapter 350 of the Laws of 1899, which the Supreme Court of Minnesota, in the Min-

neapolis & St. Paul Suburban Street Railway case, *supra,* said conferred a limited right of eminent domain upon street railway companies.

I. In both briefs of counsel it is asserted with great emphasis that it, in fact, makes no real difference, so far as this case is concerned, whether the Appellee was organized under Title I or Title II, because, as they say, it is stated in the articles of incorporation that the term of the charter is **fifty years,** and that that is the term, whether right or wrong, which is referred to in the ordinance of 1875.

In one place, to-wit, on page 58 of Mr. Munn's brief, counsel says:

> "The words 'during the term of its charter' as used in the ordinance cannot be misunderstood; they mean the term of existence specified in the Articles of Incorporation."

This position, taken emphatically in both briefs, is so radically different from that taken in the argument in the Lower Court that we feel constrained to call the Court's attention to it. Mr. Munn, in his argument in the Lower Court, which, as before stated, was taken down by a stenographer and transcribed, for the use of counsel, stated (top of page 4 of Transcript of Argument) as follows:

> "Counsel reminds me that it may be necessary to call your Honor's attention to why this is a material question." (He is now speaking of whether the corporation was organized under Title I or Title II). "If their contention is correct and we must have organized under Title II for a period of thirty years, and not

> under Title I for a period of fifty years, then our contract with the City has terminated, because thirty years would be 1903, and we would cease to be a corporation after that time, and, of course, **our contract would terminate if that were true.** That is why this is a material issue in this matter at the present time, because the ordinance itself provides that the franchise with the City is granted **for and during the term of our charter, that is, our corporate charter; thus you see making this question a material issue in this case."**

Not the slightest suggestion was ever heard from counsel in the Lower Court that anything but the lawful term for which this Appellee could be organized was the term referred to in the ordinance of 1875. The position now taken by counsel is opposed to the frank admission which they made upon the argument in the Lower Court. But in any event, whatever they may claim here, there can be, it seems to us, no question that it is the lawful term of Appellee's charter which is referred to in the ordinance of 1875.

A contention in practically all respects similar to the one here made was set up in the case of *Cleveland Electric Railway Co. v. Cleveland,* 204 U. S., page 116, and was disposed of by this Court on page 138 of the opinion.

There a right was granted "to be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln Avenue, to-wit, July 13, 1913."

Counsel claimed there, as do Appellee's counsel here, that that was a grant to run until July 13,

1913. The *Cleveland* case is even stronger than the case at bar, for there the date itself of expiration was mentioned. Here in the ordinance of 1875 no date whatever is mentioned and no term referred to, excepting merely the term of its charter. In the *Cleveland* case this Court held that the term of the grant was only until the expiration of the grant of the Quincy Street and Lincoln Avenue lines, which the Court held expired, in any event, either in 1904 or 1905.

We think this case conclusively disposes of the point made by counsel and that we need pursue the question no further. Although counsel have cited several text books upon this point, we find nothing in the various citations in the slightest degree supporting their contention.

J. Counsel in both briefs assert with great positiveness that the legislative act of confirmation, to-wit, chapter 229 of the special laws of Minnesota for the year 1879, completely settles the question as to the term of their charter in their favor. They cite several cases which they claim bear directly upon this proposition. This legislative act appears in the record at page 9 and again at page 56 of Mr. Munn's brief.

On page 57 of the latter brief, counsel says:

> "The Ratifying Act of 1879, above set forth, is complete in itself, and cures any possible defect which may have existed, not only in the passage of the ordinance of July 9, 1875, but also in the incorporation of the Company."

The very most that can be claimed for that Act is that it supplied the power of contract which, prior to that time, the City lacked; *in other words, it simply validated what the City Council had done.* It in no respect adds to the letter or spirit of what the City Council had done. The construction and effect of that ordinance must necessarily be just the same after this validating Act as it was before. The power which it previously lacked to make the ordinance a contract is supplied by that Act.

It will be noticed that counsel do not attempt to point out in what respect or by what method any "defects" are cured. The first trouble with counsel's contention is, that there are, in fact, no defects to be cured. It is conceded that, so far as form is concerned, this corporation might be held to be organized either under Title I or Title II. The form of the articles complies with the provisions of both sections. It is solely a question of construction. The question of defect or defects is not involved at all. Not a single case cited by counsel has the *slightest* bearing upon this question.

K. On page 63 of Mr. Munn's brief, we find this sweeping statement:

> "We see no escape from the conclusion that this ratifying act of 1879 completely disposes of this portion of the case. The important and controlling question is, *Was there a contract for fifty years between this Company and the City under the ordinance of July* 9, 1875? This ratifying act of 1879 *so declares* and seems to settle that question; and that is the only question which arises under the conten-

tion of the City that this Company should have organized under Title II instead of Title I."

The most notable thing about this statement is its emphasis. There is not the slightest explanation or suggestion by counsel as to how this ratifying act of 1879 *declares* that the contract between the City and the Company, as shown by the ordinance of 1875, was for fifty years. It is really too obvious to admit of a particle of doubt that the construction of the ordinance of 1875 must be precisely the same before the ratifying act was passed as it was immediately after that act was passed. It is utterly *impossible* to conceive of a *single respect* in which that ratifying act could change *such construction.*

L. Again, in both briefs it is asserted that the City is estopped to question the fifty years' existence of this corporation. Counsel assert that since July 1, 1903, the City has passed resolutions requiring extensions of new lines, and that in doing so, it has necessarily recognized the continued existence of the corporation.

The period of Appellee's charter could neither be lengthened nor shortened by any act of the City Council. The term of such charter must depend upon the laws of the State of Minnesota and not upon any action of the City Council.

On April 5, 1907, the City Council passed two resolutions, one requiring a new line, and the other an extension of an existing line, and in these resolutions, as the same appear on bottom of page 23 and top of page 24, Transcript of Record, the words "as

provided in Section 3 of that certain ordinance passed by the Council on July 9, 1875," appear in one of them, and in the other these words: "The said extension is hereby designated as an extension demanded by public necessity, and the construction of the same is ordered, as provided in Section 3 of an ordinance passed July 9, 1875."

These resolutions were prepared by the counsel for the street railway company, and passed nearly two months after this action had been commenced. These words were undoubtedly inserted by the Company's counsel designedly and passed by the Council without observation and without the slightest intention of recognizing any rights in the Street Railway Company different from those which had been recognized in the various resolutions previously passed by them, in which neither *these words* nor *similar words* were ever used.

Immediately preceding the insertions of these two resolutions in the Amended Bill, are found two other ordinances, one passed December 23, 1904, and another passed April 14, 1905, requiring extensions in which no reference whatever is made to the ordinance of 1875. No such reference, of course, was necessary in any of these ordinances, and the only time such reference is made is in the two resolutions passed *two months* after this litigation was commenced. It is impossible to conceive of these words having any significance in the case at bar. And we submit that no valid argument in favor of the Appellee can be founded upon their insertion.

M. On page 69 of Mr. Munn's brief occurs this statement; in referring to the case of *Funk v. St. Paul City Railway Company*, 61 Minn. 435:

> "In that case the *only ground* upon which the Court held the law was not applicable to the St. Paul City Railway Company was that the nature of its business was such that its employes were not exposed to the hazard of those engaged in operating a commercial railway, and for that reason the law did not apply."

This is a remarkable statement, in view of the fact that two of the counsel who have prepared briefs in this case, were attorneys for the appellant, the St. Paul City Railway Company, in that case. A synopsis of their brief appears on pages 435 and 436 of the Report, and all the cases cited have reference solely to the point that the term *"railroad"* does not include *"street railway."*

Furthermore, an examination of the opinion shows conclusively that the Court squarely decided the proposition that the term "railway" or "railroad" when used in the statutes of the State of Minnesota, did not include *"street railways."* Incidentally, in discussing the case, the Court did refer, as bearing upon the question of intention, to the fact of the distinction between the hazards of a street railway and of a commercial railroad.

In a concurring opinion in the same case, Mr. Justice Mitchell makes the point most emphatic that "railway" and "railroad" in the legislation of Minnesota does not include street railways, and then discusses the difference between the hazards

of operating an ordinary street railway and a commercial railroad as a reason for making the statute apply to one class only of railroads in order to avoid the objection of the act being class legislation.

N. In both briefs of Appellee, counsel have insisted that the word "transportation" as used in Title II of Chapter 34, Revision of 1866, as amended, was not broad enough to authorize the organization of a *street railway* company. The reason for this is, counsel insist, that in other chapters of the statutes relating *solely to taxation,* the word "transportation" is used in connection with express and stage companies.

In 1874 after the incorporation of this company, one section of the tax law provides that the personal property of street railroad, plank-road, gravel-road, turnpike or bridge companies shall be listed or assessed in the county, town or district where the principal place of business is located, and the track or bridge shall be held to be personal property; while another section of the same chapter relating to taxation reads as follows:

> "The personal property of express or transportation companies shall be listed and assessed in the county, town or district where the same is usually kept."

These sections are evidently based upon the nature and kind of property to be assessed and have no relation whatever to the nature or character of the corporation or the particular provisions of the statutes under which they may be organized. Coun-

sel for Appellee in neither of the briefs filed venture the assertion that "transportation" standing alone is not sufficiently broad and comprehensive to include street railway companies. According to their own argument, stage, omnibus and express companies would, undoubtedly, come under the head of transportation, for some or all of these words are used in the different sections cited by them on pages 25 and 26 of Mr. Thygeson's brief.

The Supreme Court of Minnesota in the *Minneapolis & St. Paul Suburban Street Railway Co.* case, 101 Minn., on page 147, said:

> "A street railway is an improvement on the coach or omnibus, and is operated for the use and benefit of persons desiring to be *transported* along the street."

If the principal function of a company is to *"transport"* persons, then it would be idle, it seems to us, to assert that a street railway company is not a *"transportation"* company. It will be noticed by an examination of the statute in which the word "transportation" first appeared with reference to the organization of corporations (see amendment to Title II of Chapter 34, Revision of 1866, the same being chapter 33, Laws of 1868, pages 25 and 26 of appendix to Appellant's brief), that this word is not used in connection with other words which would necessarily, or even naturally, restrict its meaning.

Chapter 23, Laws of 1868, is an amendment to Title II of Chapter 34, Revision of 1866. The heading to this Title is, "Of corporations for pecuniary

profit *other than those named in Title I.*" The word "transportation," therefore, as used in this amendment means all kinds of *"transportation"* business other than those named in Title I. This would, we think, without question, necessarily include express, stage, omnibus or other common forms of transportation, including street railways, which are merely an improvement upon the coach and omnibus, and whose main, and in fact, only purpose is to *"transport"* persons from one place to another.

In *Columbia Conduit Co. v. Commonwealth,* 90 Pa. State, 308, it was held that a corporation engaged in the removal of petroleum from place to place by means of pipes was within the meaning of an act taxing "transportation" companies. The Court in that case held that the word was used in its broad signification; that the usual dictionary meaning, unless otherwise restricted, should be adopted, and that that meaning was "to carry or convey from one place to another; to remove from one place to another."

In *Gloucester Ferry Co. v. Pennsylvania,* 114 U. S. 203, this Court said:

> "Transportation implies the taking up of persons or property at some point and putting them down at another."

We think it admits of no doubt that street railway companies, as known and understood in 1866 and in 1868, at the time of the amendment, and in 1873, when the Appellee was organized, a street railway being then merely an improvement upon

the coach and omnibus, and for the most part consisting of small cars propelled by one or two horses and for only short distances upon the streets, could be organized under the term "transportation."

The term "lawful business" would certainly include it, and, consequently, the argument of counsel that, unless street railways in 1866, 1868 and 1873 could be organized under Title I as railroads or as works of internal improvement which require the taking of private property or any easement therein that they could not be organized at all, necessarily fails.

The main and only purpose declared by the Appellee in its articles of incorporation is to construct and operate a street railway. Its articles, we respectfully submit, will not permit of any other construction. Being, therefore, a street railway pure and simple, it could not be organized under Title I, and could clearly be organized under Title II. Being organizable under Title II, its term could not exceed thirty years. Whatever arguments counsel for Appellee may advance in favor of their present contention, the decision of the Supreme Court of Minnesota in the *Minneapolis & St. Paul Suburban Street Railway Co.* case, in the 101 Minn., to which we have so often referred, seems to us to conclusively settle this controversy in favor of the Appellant.

II.

ADMITTEDLY, THE BURDEN IS UPON THE APPELLEE TO SHOW THAT IT HAD, AT THE TIME OF THE COMMENCEMENT OF THIS ACTION, A CONTRACT WITH THE CITY OF MINNEAPOLIS, WITH REFERENCE TO AN ELECTRIC STREET RAILWAY, WHEREBY THE CITY WAS CONCLUSIVELY BOUND NOT TO REDUCE THE RATE OF FARE BELOW FIVE CENTS, FOR A CONTINUOUS PASSAGE OF NOT EXCEEDING THREE MILES IN LENGTH.

Appellee's counsel in the briefs which they have prepared, have neither correctly stated nor in any place discussed the real position of the City with reference to the *Ordinance of September* 19, 1890. We have endeavored in our brief to clearly state just what our contention is with reference to the effect of this ordinance. It seems to be necessary to again state it. It is as follows:

First. The Ordinance of 1875, confirmed by the Legislature in 1879, constituted a *contract* between the City and the Railway Company with reference to a *horse street railway*, and with reference to a *horse street railway only.*

Second: On September 19, 1890, the City Council passed the ordinance which gave to the Minneapolis Street Railway Company *the right*, and *the only right it has ever had*, to *construct, operate* and *maintain* an *electric street railway.*

Third: Further, the Ordinance of September 19, 1890, together with such parts of the Ordinance of

1875 as are incorporated therein by *Section 8 of the former ordinance,* constitutes the only evidence of any *contract, permit* or *license outstanding* between the City of Minneapolis and the Minneapolis Street Railway Company so far as *an electric street railway* is concerned; and the rights, duties and obligations of the respective parties must be determined by *that ordinance,* and *that ordinance alone.*

Now, the present contention of counsel for the Railway Company is almost diametrically the opposite of the foregoing. They claim, *First,* that the ordinance of 1875 gave to them the right to use the streets of the City of Minneapolis for a *passenger railway system,* and that that right is *absolute* and *exclusive* and that *the provisions of Section 4 of said ordinance,* with reference to the use of *animal or pneumatic power,* is merely a *regulatory provision* and not *contractual.*

Second: That the Railway Company gets its right to construct and maintain its street railway line from the *ordinance of* 1875, and that the ordinance of September 19, 1890, is a *regulatory ordinance permitting* it to operate its cars by electricity.

Third: That the Railway Company has constructed, operated and maintained its electric street railway line under the provisions of the *old ordinance,* to-wit, 1875, and not under *the Ordinance of September* 19, 1890.

These contentions of Appellee's counsel are so opposed to the facts appearing in the record that we wish to specifically call the Court's attention to them.

We have already called the attention of the Court to the fact that the Ordinance of September 19, 1890, is neither *amendatory in form nor in substance.* Counsel persist in their briefs in referring to it as an *amendment.* It seems to us impossible to so construe it. In many other instances appearing in the record, where ordinances or resolutions amendatory in form and character have been passed by the City Council, the fact has been so expressly stated in them. Not only the *title* but all the language of the Ordinance of September 19, 1890, unmistakably points to the fact that it is a *separate, distinct* and *independent ordinance.* The difference in legal effect between considering this ordinance as an independent grant or permit and as an amendment of the old ordinance of 1875 is obvious. If it was merely amendatory of the old ordinance, it might perhaps be well claimed that the latter remains in full force and effect, except so far only as the ordinance of 1890 necessarily repeals the same, or any part of the same. On the other hand, if the ordinance of 1890 is a *separate, distinct* and *independent ordinance,* then only so much of the ordinance of 1875 as is expressly incorporated therein or made a part thereof, either as respects one or both of the parties thereto, will *survive* and be *effective with reference to the new railway system, to-wit, an electric system.*

Throughout both briefs, Appellee's counsel have continually put the case as though the burden was upon the City to show that any or all of the provisions of the Ordinance of 1875 had been *repealed* or *modified* by the Ordinance of 1890. The obvious fact is that this controversy between these parties is with reference to the construction, maintenance and operation of an *electric street railway line.* Upon that point there is no question. It is expressly admitted that an *electric* railway line is what the Company is now *operating,* and that it is *not operating* any *horse* cars. The burden is upon the Appellee to show that it has a contract with the City with reference to the *electric street railway lines.* Where is that contract to be found? Certainly the ordinance of 1875 neither purports to give, nor, in fact, gives it any right or authority to operate an *electric* street railway line. That much is conceded. Whence, therefore, did it secure this alleged right with reference to an electric street railway?

This case was submitted on final hearing upon Amended Bill and Answer and a stipulation of counsel, which appears on pages 116 and 117, Transcript of Record.

The judgment and decree in the case specifically states that the case was heard on *Amended Bill* and *Answer* and the *stipulation* referred to (see page 134). Consequently, all allegations contained in the answer are admitted to be true.

Section 327, *Bates on Federal Equity Practice.*

Banks v. Manchester, 128 U. S., pages 244, 251.

Let us look, therefore, to the allegations of the defendant's answer and see what is admitted with reference to this matter. In paragraph 7 of the answer, on page 40, Transcript of Record, appears the following:

> "Respondent admits the passage of the resolutions and ordinances set out in paragraph VIII of the amended bill of complaint, but alleges that all of the resolutions in said paragraph set out, were passed by the Common Council of the City of Minneapolis *at the urgent request of said complainant,* and that each and all of said resolutions were *prepared* by and *at the instance of this complainant* and for the purpose of aiding the complainant in making its experiments with reference to the use of cable power and electricity in the pro pulsion of street cars, and that, after said experiments had been made by said complainant, and on the 19th day of September, 1890, the said City Council of the City of Minneapolis passed that certain ordinance set forth in full in said Paragraph VIII of the amended bill of complaint, and that said complainant duly accepted said ordinance, in writing, and from the 19*th day of September,* 1890, up to the present time, *has constructed, maintained* and *operated its electric street railway lines* in said City of Minneapolis *under and by virtue of said ordinances and resolutions* and not otherwise, and that since the 19th day of September, 1890, the said complainant has had no right, power or authority to *construct, maintain* or *operate* its street railway lines upon any of the streets of the City of Minneapolis by the use of electricity, except under and by virtue of the provisions of said ordinance of September 19, 1890, and that since on or about the 19th day of September, 1890, the said complainant has operated all of its street railway cars in, upon and along the streets of this respondent by the

use of electricity, and not otherwise, and that it is now, and at the time of the bringing of this bill was, operating all of its street railway lines in said City of Minneapolis solely by the use of electricity, and that since the 19th day of September, A. D. 1890, it has not *constructed, maintained* or *operated,* within the City of Minneapolis, any *horse street railway lines,* and that on or *about the 19th day of September,* 1890, it *wholly abandoned the operation of its street railway lines in said City of Minneapolis by animal power.*"

On page 41 of the Transcript of Record, appears the following allegation of appellant's answer:

"Respondent further alleges that on September 19th, 1890, and for a long time prior thereto, the said horse street railway lines of this complainant in said City of Minneapolis were wholly *inadequate to the demands and needs of the people of the said City of Minneapolis,* and that various persons, parties and corporations were then seeking to obtain permits from the said City of Minneapolis, *to construct, maintain and operate electric street railway lines along and upon the streets of the said city,* and that the said City of Minneapolis passed said ordinance of September 19th, 1890, and the said complainant accepted said ordinance as a *complete and independent permit to construct, maintain and operate electric street railway lines in, along and upon the streets of the said City of Minneapolis.*"

Then follows this allegation on page 41 of the Transcript of Record:

"*This respondent specifically denies that the said* complainant *constructed, maintained or operated its electric lines of street railway in* said City of Minneapolis in reliance upon any supposed right under said ordinance of July

9th, 1875, to charge five (5) cents for each passenger riding upon its said lines, and alleges that the said complainant accepted and consented to all of said ordinance of September 19th, 1890, and by its acceptance of, and consent to, said ordinance, agreed that this respondent should, at all times, have and reserve to itself the right to regulate, reduce or otherwise change the rate of fare to be charged by complainant to passengers upon its said electric street railway lines."

On page 42 of the Transcript of Record, is the following allegation from defendant's answer:

> "Respondent admits and alleges that it now *claims*, and ever since the passage of the ordinance of *the 19th day of September*, 1890, *has claimed*, that it has the absolute right to regulate, control, reduce or otherwise change the amount or rate of fare to be charged by this complainant for each passenger riding upon its electric street railway lines, and that it has such absolute right, power and authority to reduce such amount or rate of fare below five (5) cents, and that it has such right, power and authority to so regulate, control, reduce or otherwise change such amount or rate of fare, without this complainant's consent, and that such right, power or authority is fully delegated to it from the legislature of the State of Minnesota by its charter, and also reserved to it by the express terms of the said ordinance of September 19th, 1890."

All of the allegations of fact contained in the foregoing quotations from defendant's answer are, therefore, expressly admitted and must be taken, for all purposes, as true. Briefly stated, therefore, the following must be accepted in this case as admissions of fact:

First: *That the old horse street railway had become inadequate and obsolete, and upon the passage of the Ordinance of September* 19, 1890, *was wholly abandoned by the Appellee.*

Second: *That the resolutions referred to, which antedated the passage of the Ordinance of September* 19, 1890, *were prepared by and passed at the request of the Appellee.*

Third: *That the Appellee has constructed, maintained and operated its electric street railway lines in the City of Minneapolis under and by virtue of the Ordinance of September* 19, 1890, *and that said ordinance, and appellee's acceptance of it, was "a complete and independent permit to construct, maintain and operate electric street railway lines in, along and upon the streets of said City of Minneapolis."*

Fourth: And that from the passage of the Ordinance of September 19, 1890, the City has always consistently and persistently claimed and maintained its absolute right to regulate, control, reduce or otherwise change the amount or rate of fare to be charged by the complainant.

But this is not all. Notwithstanding the statements and claims of counsel put forth in their briefs, we have further admissions made in the Record which, **independent of everything else,** would seem to put at rest all doubts as to the **proper construction of these resolutions and ordinances.**

As before stated in our brief, and as will appear from an examination of the Record, in 1892 the City Council passed the so-called Harvey Ordinance, which was a radical modification, or rather enlargement, of the transfer privileges mentioned in Section 6 of the Ordinance of 1890.

The Railway Company refused to accept the ordinance and to comply with its provisions. The City commenced an action to compel compliance with it. The complaint or information, answer, findings of fact and conclusions of law, and the memorandum of the Trial Judge are made part of Appellant's answer in this action. These papers all appear in the Transcript of Record, pages 54 to 115, both inclusive.

The Street Railway Company's answer in that action will be found on pages 70 to 83 of the Transcript of Record, both inclusive. In that answer (see page 70, Transcript of Record) the Street Railway Company expressly admitted that it is "a corporation of this State, duly created and organized under the laws thereof, with power and authority to construct, maintain and operate street railway lines in said City under and by virtue of the power and authority vested in it by its charter and the several ordinances, and resolutions of said City Council of the City of Minneapolis, hereinafter referred to."

Second: After referring to the experimental resolutions passed by the City Council in 1889 and 1890, the Street Railway Company makes the fol-

lowing allegations (see page 78 of the Transcript of Record):

> "That afterwards, and *prior to the construction and completion of the railway lines or any of them, in either of the resolutions referred to,* it was deemed advisable and expedient, both by the *City Council* of Minneapolis, and *this respondent,* that all of the *existing, contemplated* and *future lines of street railway, in said city,* should be operated by electricity, as a motive power, and that certain other *agreements, stipulations* and *covenants,* between said city and said street railway company, *relating to the construction and operation of said lines, should be made and entered into,* and thereupon, for that purpose, and for the purpose of **consolidating and concentrating into one contract and agreement, all of the provisions, stipulations, covenants and conditions, to be observed and kept by the respective parties, relating to respondent's street railway lines and the operation thereof, by electricity as a motive power, and as supplemental to said ordinance, 'Exhibit A,'** and the other ordinances and resolutions hereinafter referred to, the said City Council of the said City of Minneapolic, did, on the 19*th day of September, A. D.* 1890, duly pass and adopt a certain ordinance entitled, 'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its lines in Minneapolis by electricity,' which is the same ordinance referred to in paragraph eight of said writ, and which ordinance is hereinbefore, and in paragraph eight of this answer set out at length and in full, and which is, by reference thereto, hereby made a part of this separate defense the same as though herein again set out at length."

Third: After thus alleging the consolidation and concentration of all agreements, stipulations,

covenants and conditions into the Ordinance of September 19, 1890, and the acceptance thereof by it, the Street Railway Company expressly alleges as follows (see bottom of page 78 and top of page 79, Transcript of Record):

> **That after the adoption and acceptance of said ordinance last above referred to** (to-wit, the Ordinance of September 19, 1890) **this respondent, under the provisions thereof, rebuilt and reconstructed its entire system of street railways in the City of Minneapolis and prior** to the 25th day of November, A. D. 1892, was operating the same, and all thereof, **under and in accordance with the provisions of said ordinance."**

Fourth: And following up the foregoing allegations, in that answer, the Street Railway Company again alleges (see bottom page 79 and top of page 80, Transcript of Record):

> "And that said ordinance passed September 19th, 1890, entitled, **'An ordinance authorizing the Minneapolis Street Railway Company to construct and maintain tracks and to operate all its railway lines in the City of Minneapolis by electricity,'** as so amended, by the ordinance last above referred to, Exhibit '7,' is still in full force and effect, and is a *valid* and binding *contract and agreement* between the relator herein and this respondent, and that said ordinance, except as heretofore stated, has never been, by said City Council, amended, altered or changed, and **cannot be amended, altered or changed without the consent of this respondent.** That this respondent has never consented, in any form, to any amendment or change thereof, except as hereinbefore stated, and that any other attempted alteration or amendment of said ordinance, by said City Council, whether as in said writ stated, or otherwise, is ille-

gal, null and void, and in violation *of article* 1, *Section XI, of the constitution of the State of Minnesota, and of article* 1, *Section IX of the constitution of the United States,* concerning the limitation of the powers of said state to pass or enact any law *impairing the obligation of contracts.*"

Fifth: Again on bottom of page 81, Transcript of Record, the Street Railway Company alleges:

> "This respondent does further aver that to require transfers to be given by this respondent at the points of intersection of each and every line of said street railway, in said city, would impose upon this respondent an unjust and unreasonable burden; would deprive it of just and reasonable compensation for the services performed by it as a common carrier, and would require it to transport passengers over its said lines in said city at rates that are unjust and unreasonable, and would be unjust and burdensome, as well as illegal and in violation of the contract entered into between it and said relator."

Sixth: As we have before stated in our brief, and as appears by the Record, the decision of the State District Court was against the Street Railway Company; and without taking any appeal from the decision of the Lower Court, a stipulation was entered into reciting the fact that the defendant company had put into full force and effect the transfer system provided for in the so-called *Harvey Ordinance,* and dismissing the suit without costs to either party. (For this stipulation see page 116, Transcript of Record).

We respectfully submit that the foregoing conclusively disposes of the present contentions of Ap-

pellee's counsel with reference to the nature and effect of the Ordinance of September 19, 1890.

The idea running through the argument of counsel, in both of their briefs, that the Ordinance of 1890 is a mere regulatory one and is merely amendatory of the Ordinance of 1875 and is not a grant of any rights or privileges, is born of the necessities of this case and is not in accordance with either the facts or the previous contentions of counsel.

The language of the ordinance itself would seem to effectually dispose of such contentions. The ordinance not only purports to grant certain rights, but it expressly provides that before it shall take effect it must be accepted in writing by the company. (See Section 10 of the Ordinance of September 19, 1890, page 21 of the Transcript of Record). That section reads as follows:

> "Before this ordinance shall be in force or effect, the said Street Railway Company shall accept the same by filing with the City Clerk of said city its written acceptance thereof, within thirty days from the passage of this Ordinance, agreeing to carry out all the matters and things herein contained, and *all the rights hereby granted* are conditioned upon the faithful performance by said Street Railway Company of all the agreements herein contained on its part to be done or performed."

This ordinance was, in fact, accepted by the Street Railway Company in writing, whereby the Company expressly agreed to *"comply with the terms and provisions thereof."* (See the written acceptance on page 65, Transcript of Record).

It will be noticed that in both of Appellee's briefs Appellant's contentions are nowhere correctly stated or discussed. In Mr. Thygeson's brief, on page 137, he starts the discussion of the contract feature of this case with this statement:

> *"The Ordinance of July 9, 1875, was not repealed by the Ordinance of September 19, 1890,* and the provisions of Section VIII of the original ordinance of July 9, 1875, on the subject of fare still continues as the existing contract between the City and Appellee."

This is an obvious evasion of the real question. It is not at all necessary to a proper determination of this case, and we have nowhere contended that, so far as a horse or pneumatic power street railway is concerned, the ordinance of 1875 is either repealed or abandoned. Whether or not the Street Railway Company might still go back to that ordinance and claim rights thereunder with reference to a *horse* street railway, it is not necessary to discuss or determine. And whether or not that ordinance is *repealed* we have nowhere discussed in our brief.

As applied to a horse street railway, we have never contended that it was repealed. Both Mr. Munn and Mr. Thygeson, in their briefs, persist in treating the case as though Appellant's counsel were contending that the Ordinance of 1890 repealed all of the Ordinance of July 9, 1875.

Our contention has been, from the start, and we have tried to make it as plain as possible, that the Ordinance of 1875 dealt with a *known, definite,* and

complete thing, to-wit, *a horse or pneumatic street railway and nothing else;* that whatever rights, contractual or otherwise, the Street Railway Company obtained under that ordinance, were confined to a *horse* or *pneumatic power street railway;* that the ordinance of September 19, 1890, not only *purports* to deal with but, in fact, *deals* with an electric street railway, which is a **separate, distinct and independent** thing. It is **something** which was **not** included in the original ordinance of 1875. It is something which the City of Minneapolis could have given the right to **construct and operate to another company.**

The Ordinance of 1890 is not an amendment of the Ordinance of 1875. It is not supplemental thereto. It does not relate back to that ordinance in any way, shape or manner. It speaks from its date. And the old ordinance of 1875 is, so far as this ordinance is concerned, a *dead letter*, except only as to so much of it as is **incorporated into it by the provisions of Section VIII thereof.**

The question is not one of so-called *repeal* of the ordinance of 1875. It is, What, if anything, contained in the ordinance of 1875 is brought forward and incorporated into the ordinance of 1890, *so as to make a binding contract on the part of the City not to reduce the rate of fare mentioned in the old ordinance?*

It will be noticed that neither of the attorneys preparing briefs in this case for the Street Railway Company has given to this obvious point even a passing glance. As we have stated before, the dif-

ference between the contentions of the respective parties lies with reference to this question, *almost wholly in the view point.*

If a horse street railway and an electric street railway are two separate and distinct things; if the ordinance of 1875 was exclusive only so far as it related to a *horse* or *pneumatic power* street railway, and the city had a right to grant a permit to any other company to construct and operate an *electric* street railway; and if the ordinance of 1890 was, in fact, as it purports to be, and as it is alleged in the answer and admitted to be, a **separate, distinct and complete** ordinance dealing with the right to construct, maintain and operate an *electric* street railway line, then it seems to us to admit of no doubt **that Appellee has wholly failed to show any contract with the City with reference to the rate of fare so far as an electric street railway is concerned.**

These contentions on our part are nowhere met or discussed in either of the briefs filed by Appellee's counsel. They simply evade the issue thus presented. They undertake to set up positions which they claim have been taken by the City, and then proceed to discuss, and, as they think, demolish them. Whether or not they have succeeded in demolishing them, it is unnecessary to inquire. **The obvious fact is that the propositions which they have discussed are not the ones which we have advanced.**

As a sample of the statements made by counsel, we quote the following from page 137 of Mr. Thygeson's brief:

> *"The Appellant claims that the Ordinance of September* 19, 1890, *wipes out all of the provisions of prior ordinances."*

We have never claimed any such thing. Such a claim is wholly immaterial to this discussion. Whether or not those ordinances are repealed or obsolete it is absolutely unnecessary to discuss. What we do say, so far as this controversy is concerned, with reference to an electric street railway, the existence or non-existence of all prior ordinances is wholly immaterial, except so far as the same have been incorporated into the ordinance of 1890 by the provisions of Section VIII.

Again Mr. Thygeson, through many pages of his brief, commencing on page 137, says:

> "An examination of the Ordinance of September 19, 1890, discloses the fact that it does not pretend to be a complete ordinance governing the construction, maintenance and operation and the rate of fare of street railway companies. It is patent on examination that this ordinance has one main object, viz.: the substitution of electricity as a motive power in place of animal and steam motive power used prior to that time. There is no provision in this ordinance specifying the streets on which the appellee shall operate its street railways, as in the original ordinance."

Counsel then proceeds, through many pages, to point out various things which would originally be proper subjects for regulation, none of which, he

says, are referred to in the ordinance of 1890; and that because these things are nowhere referred to, he says, demonstrates that the ordinance of 1890 was not intended to be a *complete* and *independent ordinance.*

So far as the duty of the Minneapolis Street Railway Company is concerned, Section VIII of the Ordinance of September 19, 1890, is a complete and absolute answer to the whole of counsel's argument upon that point. It makes it the duty of the Minneapolis Street Railway Company to comply with all the terms, conditions and provisions of ordinances then in existence and those that may thereafter be adopted, so far as applicable. Whatever was then in effect within the City of Minneapolis relating to operation of street railways, is made binding by that section upon the Minneapolis Street Railway Company, *just as much as though every one of those provisions were expressly set forth in the ordinance. And furthermore, the Company is made subject to all the terms, conditions and provisions of ordinances which may thereafter be passed.*

It is difficult to conceive how an ordinance could have been made more complete, at least, so far as what counsel calls regulations are concerned than this ordinance was made by the insertion of Section VIII. It hardly seems necessary to pursue the examination of counsel's argument upon this point any further. The answer to it, we think, is obvious.

Again, counsel, on page 140 of Mr. Thygeson's brief, in trying to disprove the assertion which he has made that the ordinance of 1875 was not repealed by the ordinance of 1890, argues that Section 8 of the latter ordinance expressly recognizes the existence in full force of the ordinance of 1875. It will be noticed that that section provides that, "in the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance, entitled, 'An ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force," etc.

Counsel insist that the last three words expressly recognize not only the existence but the continuance in full effect of all the provisions of that ordinance. In the first place, as we have already pointed out, it is only the Minneapolis Street Railway Company that is *made subject* to the *conditions, limitations* and *provisions,* etc. And it is referring to those conditions, limitations and other provisions of that ordinance, as amended and as then in force, and others that may be passed, so far as applicable, to make as definite as possible *what the Minneapolis Street Railway Company is made subject to.*

Counsel seem to seriously argue that these words "now in force" are an express recognition by that ordinance of the validity, existence and applicabil-

ity of the old ordinance to the electric street railway line. And, furthermore, he assumes, that because the Minneapolis Street Railway Company is made expressly subject "to the conditions, limitations and other provisions," by implication or some other method the City Council is also made subject to and bound by the same.

The argument is obviously specious and is directed only against a contention which we have never set up. We have always maintained that the Ordinance of 1875 related only to a horse or pneumatic power street railway. The ordinance, we think, demonstrates the soundness of this contention. We have cited many authorities directly bearing upon this point. We have only one more to add which is not referred to in our brief.

Teachout v. Des Moines Broad-Gauge St. Ry. Co., 75 Iowa, 722, 38 N. W. Rep. 145: This case was omitted from our brief by inadvertence. It is squarely in point upon our contention that what passed by the ordinance of 1875 was merely the right to construct, operate and maintain a horse or pneumatic street railway. The language of the Supreme Court of Iowa upon this point is so clear and emphatic that we here quote it:

> "It" (the Street Railway Company) "has the exclusive right to operate its railways by animal power; and it has no more right to interpose objections to the building and operation of other street railroads, to be operated by other power, than if no grant of power has ever been made to it. The city, it is true, agreed, by Section 10 of the ordinance, that it would not 'confer upon any person or corporation

any privileges which will impair or destroy the rights and privileges herein granted to said company.' It is strenuously contended that the granting of the right to operate other street cars will necessarily impair the rights of the Narrow-Gauge Company, by diminishing its revenue, which is derived from the carriage of passengers. Perhaps this argument is sufficiently answered by the thought that, when the city made the contract, based upon this ordinance, the parties thereto were dealing with the known, and not with the unknown. It may well be questioned whether the city had any power to contract that no other means of public travel should be allowed upon the streets of the city except by cars drawn by horses for the period of 30 years. If so, the establishment of hack lines or omnibus lines, or other means of public conveyance, would impair the revenue of the Narrow-Gauge Company, and thus impair its rights under this ordinance. Its right is to operate a horse railroad. It is entitled to the exclusive right to do so, and to use all improvements that may be made thereto; but to nothing more. The city cannot impair that right; but it does not follow that it may not authorize other means of street travel. It did not undertake to confer upon the company the right to carry all the passengers who might desire to travel by public conveyance upon the streets; and it did not, by the ordinance, contract that new and improved and undiscovered methods of travel might not be adopted as the public wants might demand. This ordinance and contract were made by the city in behalf of the public, and it should not be so construed as to fetter and prevent the right to use new methods and appliances, the result of the inventive genius of the age, or to apply the discovery and application of the latent powers of nature to the uses of man."

As sustaining the views therein expressed, the Iowa Supreme Court cited the *Gas-Light Co.* case, 28 Fed. Rep. 529; *Railway Co. v. Tramway Co.*, 30 Fed. Rep. 324; and the case of *Bridge v. Hoboken*, 1 Wall. 116, all of which are cited and discussed in our brief.

The real question involved in this case, therefore, is not the one stated and repeatedly reiterated by appellee's counsel, to-wit, how much of the ordinance of 1875 has been repealed, but how much of that ordinance is incorporated into the ordinance of September 19, 1890, and what of that ordinance has been so incorporated, if at all, as to make a contract with reference to the rate of fare binding upon the City.

In 1890, as the Record shows, the horse street railway was inadequate and obsolete, and certain persons and corporations were anxious to get permits from the City to construct and operate electric street railway lines. Certain resolutions were passed during the years 1889 and 1890 permitting the Street Railway Company to experiment with electricity, and, according to the allegations of the answer of the Minneapolis Street Railway Company in the suit brought by the City in 1893, to which reference has already been made, a complete concentration and consolidation of all the agreements, covenants and conditions contained in such resolutions was made in the ordinance of September 19, 1890; and that upon the passage of that resolution and its acceptance in writing by the Company, the latter went ahead and *reconstructed* and *rebuilt* all

of its lines in the City of Minneapolis, and that it did so, as it expressly alleged, *under and pursuant to the provisions of said ordinance.*

The foregoing discussion and quotations from the Record, we submit, conclusively demonstrate that the present contention of Appellee, with reference to the nature, force and effect of the Ordinance of September 19, 1890, is neither in accordance with the understanding of the City nor itself and its counsel prior to the commencement of this action. There is, we respectfully submit, a complete change of front with reference to this ordinance. What, prior to the commencement of this action, had always been regarded by both the Appellant and Appellee as a *separate, distinct* and *independent* ordinance, under, by and pursuant to which the Appellee had completely *reconstructed* and *rebuilt its electric railway lines,* and is now operating the same, is treated as a mere *amendatory* or *regulatory* ordinance.

We feel constrained to call particular attention to what seems to be not only inconsistency but even incoherence in the various contentions put forth by counsel in their briefs and especially in Mr. Thygeson's brief. On page 90 of the latter brief, we find this statement:

> (1) *"The State of Minnesota through an unbroken line of decisions has held that obligation of contracts cannot be destroyed with impunity."*

Of course, it is hardly necessary to say that no one has contended to the contrary. The citation

of authorities made by counsel with reference to this point requires no comment. On page 92 the same counsel says:

> (2) "There is no provision in the constitution or laws of the State authorizing the modification or repeal of the charter of the Appellee."

Again we need only say that we have never contended to the contrary. The statement of counsel is wholly immaterial to any question here involved. And on the same page, counsel says:

> (3) "The rule of strict construction applies only where the reason for the rule exists. It does not apply to reservations which destroy the original grant,—to provisions in favor of the public or to the language of the grantor."

This statement of counsel seems to have no pertinency whatever to the question which he is there discussing, to-wit, the existence or non-existence of a contract. The proposition which he must establish is, what is the evidence of the contract upon which the Appellee is relying.

In the construction of that contract, the rule for which we have contended is, that all doubts must be resolved in favor of the public. Counsel evades the force of this rule by asserting that it has no application to a reservation in a grant. So far as the contract is concerned, the question of reservation is only important in determining whether or not any or all of the provisions, contractual or otherwise, of the old ordinance are incorporated into the new one.

If it is not clear beyond a reasonable doubt that by the Ordinance of September 19, 1890, the City bound itself, or attempted to bind itself, not to reduce the rate of fare below five cents for a continuous ride of not exceeding three miles in length, *then there cannot be any contract even in form, with reference to the electric street railway line.*

On page 100, counsel says:

> (4) *"The Ordinance of July 9, 1875, and its acceptance, as provided by the ordinance, and the ratification by the legislature, became a contract between the City of Minneapolis, State of Minnesota and the Company."*

And then he proceeds through fourteen pages to discuss this proposition. As to the force and effect of the Ordinance of July 9, 1875, after the same had been confirmed by act of the legislature in 1879, as between the City and the Railway Company, with reference to a *horse* or *pneumatic power* street railway, we have never made any question. Our contention has always been that the subject-matter of the Company's contract was simply a *horse* or *pneumatic power* street railway.

On page 113, counsel says:

> (5) *"The City may agree as to motive power under the exercise of its police power."*

He devotes to this proposition nearly ten pages, and cites several cases as authority for the statement. None of these cases, we submit, are at all in point upon the question here involved, to-wit, *Is there, or is there not, a contract between the respec-*

tive parties hereto with reference to an electric street railway line?

On page 120, counsel insists that Chapter 74 of the General Laws of 1893, which provides that the State shall have full power of supervision and regulation of public service corporations, and shall have power and authority to fix and regulate their charges for service, and that such corporations shall be subject to any conditions imposed by any City or village, *in some manner creates a contract between these parties where none existed before.*

In the first place, this general law would not apply to Minneapolis unless so expressly stated therein, because the latter is operating under a special charter. But conceding, for the sake of the argument, that it did so apply, it could have no possible bearing or effect upon the construction of an ordinance passed in 1890. Furthermore, it would seem to be absurd to say that when the State has expressly provided that it shall have the power and authority to fix compensation, etc., and then adds what is, in effect, a proviso thereto, that such public service corporations shall be subject to any *conditions* imposed by cities or villages, that such *conditions* shall include the right to fix fares or to contract with reference to fixing fares, which power has been so expressly reserved to the State.

On page 121 counsel says:

> (6) *"The Ratifying Act of* 1879 *gave the City power to contract as to motive power."*

A bare reading of the act refutes any such claim. It merely confirms what had been done by the City. The ordinance is subject to the same construction after the passage of the Act that it was subject to before. There is not a thing in any of the cases cited by counsel upon this point which gives the slightest color to the claim which he has advanced.

On page 126 counsel says:

> (7) *"The rule of liberal construction should be applicable to the grant of authority to use electricity as a motive power."*

Without reference to the lack of power in the City to contract in 1890, it has never been doubted that the Appellee is not a trespasser. Under its general power to supervise the streets and their use, the City may license or permit the proper use thereof for street railway purposes. Counsel seem to lose sight of the fact that what is here involved is not merely a *permit* or *license,* but a *binding contract.*

On page 127 the same counsel says:

> (8) *"General authority over streets authorizes the City to contract as to motive power."*

If there is anything settled by the decisions of the State of Minnesota and of this Court, it is that, general authority to supervise and regulate the use of streets by a City does not give it the right to enter into a contract or to grant irrevocable rights, for fixed terms, in the streets.

On page 128, counsel rather inconsistently add as follows:

(9) *"Change of motive power is mere regulation and not the creation of a new franchise or grant."*

It seems to be claimed, first, that the City is fully authorized to *contract* as to motive power, but that the use of any particular *motive power* is not a matter of *contract* but merely a *regulation.* Immediately following this statement that motive power is a subject-matter of regulation and not of contract, we find the following one (see page 130):

(10) *"The City charter, special laws* 1881, *does not contain all the provisions of law investing the City with its power and authority."*

As bearing upon this proposition, counsel cites Section 2916, Revised Laws of Minnesota 1905, which is the same section appearing as Section 2642 of the Revision of 1894 and Section 47 of Chapter 34, Revision 1878 and Section 29 of Chapter 34, Revision 1866. Counsel cites this section of the statute which has existed so long as authority for a City to enter into a contract with **street railway companies with** reference to the occupation of the **streets for street railway purposes.**

And yet counsel can hardly be unaware of the fact that it was expressly decided by the **Supreme Court of the State of Minnesota in the case entitled, City of Stillwater v. Thos. Lowry, 83 Minn., page 275, that such section had no reference whatever to street railway companies and to the use of streets by such companies.**

On pages 277 and 278 of the opinion, Chief Justice Start in answer to a contention that Section 2642, General Laws 1894, gave the City of Stillwater authority to enter into a contract with reference to the use of streets, said:

> "It is further claimed by the plaintiff that General Statutes 1894, Section 2642, which declares that it shall be competent for municipalities to agree with a railroad company as to the terms on which it may occupy any street which may be necessary in the location of any part of its railroad, authorizes the grant in question. This provision manifestly refers only to commercial steam railroads. *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435. We therefore hold that the Village of South Stillwater had no power to grant the franchise in question."

This decision was rendered on May 24, 1901, and would seem to be a complete answer to the point which counsel seeks to make.

On page 134, counsel says:

> (11) *"The City of Minneapolis is estopped to claim the want of authority to agree as to the motive power."*

This statement has no relevancy to this discussion, unless it means that, conceding the lack of power on the part of the City to enter into a contract, it may still be estopped to deny a contract. The general proposition supported by all of the authorities, so far as we know, is that where a city lacks power to enter into a contract directly, the contract cannot be established against it by estoppel.

On page 135 we find the following statement which seems to us to be a startling one:

> (12) *"Even if it should be found that the change in motive power was unauthorized, that has no bearing on the right to reduce fare."*

The question whether or not the City of Minneapolis is authorized by the State of Minnesota by legislative act to reduce the rate of fare, is not controverted in this case. The only ground of jurisdiction in the Federal Court is that the Appellee has a valid and binding contract with the City which it, by a subsequent ordinance, is seeking to violate. If there is not, in fact, a binding contract with reference to the electric street railway line, then, of course, there can be no pretense of jurisdiction in the Federal Courts, and, second, if there is a binding contract but the ordinance, of which complaint is made, has been passed by the City in the absence of all power from the legislature to pass it, then it cannot be said that there has been any violation of the United States constitutional provision.

Section 10, article 1 of that provision, reads as follows:

> "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal, coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

This provision is a prohibition on the State. An allegation on the part of this Appellee that the municipality has passed the ordinance complained of pursuant to power invested in it by the State of Minnesota is absolutely necessary to the jurisdiction of the Federal Courts. It is not any and every **unauthorized ordinance** on the part of a municipality that can be set up as a *law* impairing the obligation of contracts. The right to pass the ordinance under delegated legislative authority must be alleged, otherwise jurisdiction would fail.

It stands, therefore, so far as the Appellee is concerned, absolutely admitted in this case that the municipality had the right to pass the ordinance of which complaint is made, to-wit, of February, 1907, in the absence of a previous valid and binding contract between it and the Appellee. It is the **effect** of that ordinance of which complaint is made; and if the municipality had no power to pass it, then there can be no **impairment** by it of a previous *contract.*

(13) Commencing on page 154 and continuing to the top of page 173 of Mr. Thygeson's brief, counsel campare the provisions of the ordinance of 1875 with those of the ordinance of 1890, for the purpose, as they say, of demonstrating that the ordinance of 1890 does not purport to be a separate and distinct and independent ordinance, because so many things contained in the old ordinance are not specifically referred to in the one of 1890.

On bottom of page 154 counsel says:

> *"If the ordinance of* 1875 *is placed side by side with the ordinance of September* 19, 1890, *it is manifest at a glance that the latter ordinance does not cover the entire subject covered by the original ordinance of* 1875, *but simply and solely motive power and a few incidents to the change of motive power."*

It is unnecessary to follow counsel through the many pages which follow this statement, inasmuch as a complete answer to the entire argument, so far as most, if not all, of the quotations taken from the old ordinance are concerned is found in Section 8 of the ordinance of 1890. Counsel's argument amounts simply to this: That the ordinance of 1890 is not complete and definite and independent, because it does not set forth in exact words all the rules and regulations and provisions as to the proper construction, maintenance and operation of the system, losing sight of the fact that the language of Section 8 is, in terms, broad and comprehensive enough to include all, or practically all, of those things which they say are omitted from the ordinance of 1890. They make no reference to the incorporation into the ordinance of 1890 of those various provisions by the express language of Section 8 thereof. When the language of that provision is considered, the entire argument must fall of its own weight.

In 1893, in the action in the State Court between the City of Minneapolis and the Minneapolis Street Railway Company, the latter there alleged in its answer that, "prior to the construction and comple-

tion of the railway lines, or any of them, in either of the resolutions referred to, it was deemed advisable and expedient, both by the City Council of Minneapolis and this respondent, that all of the existing, contemplated and future lines of street railway in said City should be operated by electricity as a motive power, and that certain other agreements, stipulations and covenants between said City and said street railway company, relating to the **construction and operation of said lines,** should be made and entered into; and thereupon for that purpose, and for the purpose of consolidating and concentrating into one contract and agreement all of the **provisions, stipulations, covenants and conditions** to be observed and kept by the respective parties relating to respondent's street railway lines and the operation thereof by electricity as a motive power, and as supplemental to said ordinance, Exhibit A, and the other ordinances and resolutions hereinafter referred to, the said City Council of the said City of Minneapolis, did pass, etc., the ordinance of September 19, 1890."

In that answer the Minneapolis Street Railway Company not only made the foregoing allegations, but they followed the same with this one (see page 78, Transcript of Record):

> "That after the adoption and acceptance of said ordinance last above referred to" (to-wit, the ordinance of September 19, 1890), "this respondent **under the provisions thereof, rebuilt and reconstructed** its entire system of street railways in the City of Minneapolis, etc."

There seems to have then been no misunderstanding or misapprehension in the minds of the counsel of the Minneapolis Street Railway Company of the purpose, object, nature and effect of the ordinance of September 19, 1890. The construction which they then placed upon that ordinance, to-wit, that it was a *separate, distinct, complete* and *independent ordinance,* and that it was under and pursuant to its provisions that the Company *rebuilt* and *reconstructed* its *electric lines,* is the obvious and natural one and the one which we insist should prevail now.

Counsel for the Appellee have, throughout their briefs, argued the contract features of this case wholly upon the theory that, by the ordinance of July 9, 1875, the Company was granted an absolute and exclusive franchise for any and all kinds of street railways, in the City of Minneapolis for the period of fifty years, and that motive power is merely a matter of police regulation; and that the ordinance of September 19, 1890, was, in fact, merely regulatory in its nature, and amendatory only, of the ordinance of 1875, and that such amendatory ordinance relates to a mere matter of regulation,—leaving the old ordinance of '75 in full force and effect as to *any* and *all kinds* of street railways within the city.

We respectfully submit that this construction is an exceedingly strained and unnatural one, and opposed to the plain intention of the parties, as manifested by the language of the later ordinance, by the previous contentions of Counsel and by what has

been done under the ordinance by the Company, as shown by the record in this case.

The appellee has utterly failed to show that it has any *contract* with the Appellant with reference to an *electric* street railway, which is the only kind of a system it is now constructing, maintaining, or operating.

III.

ACCORDING TO APPELLEE'S CONSTRUCTION OF SECTION VIII OF THE ORDINANCE OF SEPTEMBER 19, 1890, IT BECOMES PRACTICALLY MEANINGLESS AND WHOLLY UNNECESSARY. COUNSEL INSIST THAT THERE IS RESERVED TO THE CITY BY THAT SECTION ONLY THE USUAL AND ORDINARY POLICE POWER, WHICH, WITHOUT THE RESERVATION, THE CITY WOULD HAVE HAD AND WHICH IT COULD NOT, IN ANY EVENT, BARGAIN AWAY.

The Company's counsel insist that Section 8 of the Ordinance of September 19, 1890, means simply that, in the use of the new motive power it shall be subject to such necessary regulations as the City might thereafter adopt to meet the changed conditions (see page 129 of Munn's brief). It certainly would seem strange that, if such was intended to be the effect of that section, it could not have been more appropriately expressed. Especially is this so when we see that when in previous ordinances any reference to, or reservation of, the police power is made, apt and appropriate language is used for that purpose.

In the Ordinance of 1875, Section 9 (see page 6, Transcript of Record) is specific upon this point. That section reads as follows:

> "The Council of the City of Minneapolis **hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads during the continuance of the rights and privileges hereby granted.**"

In Section 16 of the same ordinance (see page 7 of the Transcript of Record), is establishes what is denominated as "rules and regulations" for the operation of the cars.

Again in the ordinance of July 3, 1878 (see page 8 of the Transcript of Record) Section 2 provides as follows:

> "That the Minneapolis Street Railway Company, its successors and assigns, in the construction, maintenance and operation of said line of street railway, shall at all times be subject to all the conditions, limitations and other provisions of an ordinance of said City, entitled, 'An ordinance authorizing and regulating street, railways in the City of Minneapolis passed July 9, 1875.'"

It will be noticed that no reference whatever is there made to the right to pass other ordinances, while the same section contains another provision, as follows:

> "And the said City Council and City government shall have all powers respecting said street railway line which is retained under the provisions of said ordinance with reference to lines of railway mentioned therein."

As bearing upon this point, counsel have cited several cases, and from most, if not all, of them have made certain quotations. An examination of these cases will show at a glance that none of them are in point.

Counsel have taken an excerpt from the opinion of *McNeil v. Chicago Railway Co.*, 61 Ill. 153, and refer to it "as forcefully illustrating" the soundness of their contentions. On page 154 of the opinion in that case, the Court said:

> "The case may be stated thus: A right was granted to the Company to be exercised within a limited time. Before the expiration of the time, it was extended without condition. The extension was accepted upon the terms offered, and in consideration thereof and of the repeal of certain ordinances, the Company agreed to postpone the exercise of the right for the extended time. The other party repeals the ordinances and assents to the conditional acceptance. The contract thus completed was not an abandonment but merely a postponement of the right."

That is precisely what the case was in which the language quoted was used. Comment seems hardly necessary.

Again, counsel cites the case of *C. R. I. & P. R. R. Co. v. City of Joliet*, 79 Ill., page 25. And they quote therefrom on page 137 of Munn's brief. An examination of the case will show that it has no application whatever. There the Legislature authorized the railroad company to locate and construct its road along and across the public grounds and streets of unincorporated towns. Under the

act of the legislature the railroad company's line was located over a public park.

The Court held that in locating the road, the Directors of the Company acted as agents of the State, and that the act of location was, in fact, an act of the State, and that the Ordinance of 1853 of the municipality, with reference to the location of the tracks and the fencing of the park, did not, in fact, create the right; and furthermore that the proviso, which counsel have quoted, to-wit, "Provided that said railroad company shall be subject to all laws and ordinances which may hereafter be passed to regulate railroads in the City," could not create in the City the right to take away from the railroad company a location which had been given it by the State.

Furthermore, the Court held that the language of the proviso itself was merely to *regulate* railroads and not to take away or modify their locations.

Counsel have also cited *City of Pittsburg*, 115 Pa. State, 4, and have made a short quotation from the opinion in that case as to the regulations which a City may make with reference to a public service corporation.

An examination of the facts in that case, as well as of the decision of the Court, will show at a glance how wide it is of the case at bar. It was there held that natural gas companies, incorporated under an act of the legislature, were invested with the right of eminent domain and with all the powers and privileges necessary to the prosecution of their business, and that they were invested with the right to

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lay their mains in the streets of cities and boroughs, with the consent of the latter. The Court held that the companies derived their right to occupy the streets from the State, and that the cities and boroughs were only invested with the power to give or withhold their consent, as the case might be.

The Court further held that the City had no power to impose as conditions to the assent any right of repeal or modification, but only the right to make reasonable regulations for the transaction of their business.

Counsel have also cited the case of *City v. Telephone & Telegraph Co.,* 40 Louisiana Annual Reports, page 41. The reservation in that case, granting the consent, was in this language:

> "That *all the acts and doings* of said company *under* this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the City Council concerning the same."

The Supreme Court of Louisiana held that the grant made by the City was an irrevocable one and constituted a contract, and gave to the Company an absolute right to erect its poles and string its wires in the streets, in accordance with the terms of the ordinance.

Subsequently the City passed an ordinance forbidding the erection of any poles in a certain district and imposing as a condition of the continuance of the old poles in certain districts, the payment of an annual tax of five dollars per pole.

The Courts points out that the imposition of this tax could not be sustained upon the theory of taxation, nor as a license, but that it could only be sustained upon the theory that the City had a right to impose the same as a *further consideration* for its consent to occupy the streets.

It was held that the act of the legislature did not authorize any such action on the part of the City, and that clearly the City had no such power unless it could be said that it had it under the reserved power contained in the ordinance granting its consent.

The Court said:

> "It is the *acts* and *doings* of said company under this ordinance. This assumes that the ordinance itself is to continue in full force and effect and certainly reserves no power to repeal, destroy or alter it in any of its essential features and considerations. It recognizes the right of the Company to act and to do under and according to the ordinance, only subjecting such acts and doings to municipal regulations not conflicting with the ordinance itself."

Here the very language of the proviso is essentially restrictive and reserves merely the power to regulate the acts done under and pursuant to the ordinance, but not the *considerations* upon which the ordinance was based.

On page 136 of Mr. Munn's brief, counsel say:

> "In construing a power reserved to the City of Baltimore, quite similar to that contained in the September 19, 1890, Ordinance, the Court held in *The Baltimore Trust Company v. May-*

or and City of Baltimore, 64 Fed. 159, as follows:" (Then follows a long quotation from this case).

The U. S. Circuit Court there held that the City of Baltimore was expressly authorized by the legislature to enter into a contract with the railway company in question, and that the attempted action of the City Council was in violation of its contract.

In that case, the railroad company was originally authorized to construct double tracks in certain streets. The ordinance complained of was one requiring it to operate one track in certain streets. The Lower Court held that this was an impairment of the contract. The language quoted by counsel is taken from the opinion of the Lower Court.

Counsel neglect to state that this case was **reversed** by this Court in the 166 U. S., page 673.

It was there held that, assuming without deciding that there was a contract, the ordinance complained of did not, in fact, impair that contract; that the requirement with reference to double tracks was a reasonable one, and one which the City Council unquestionably had the right to make.

It will also be noticed that in that case, the reservation which counsel insists is **"quite similar to that contained in the September 19, 1890, ordinance,"** reads as follows:

> **"And shall be subject to all general regulations now existing or hereafter to be made relating to city passenger railways, not inconsistent with this ordinance."**

It will be observed that the language of this reservation is, in all respects, **restrictive.** In the first place, it is only *general regulations* which are referred to. Second, regulations made relating to city passenger railways and especially **"not inconsistent with this ordinance."**

We submit that it must be extremely difficult for anyone to see in this case, without reference to its reversal in this Court, the slightest authority for the position which Appellee's counsel have taken.

Furthermore, the Company's counsel persist in giving a construction to Section 8, Ordinance of September 19, 1890, (see page 21 of the Transcript of Record) which is utterly unreasonable and wholly unwarranted (see pages 125 and 127 of Munn's brief).

On page 125, counsel says:

> *"The City bases its authority to destroy the rights of the Company on the claim that the last seven words of said Section 8, viz., 'or hereafter adopted, so far as applicable,' gives to it the power to enact any ordinance thereafter that it deems best."*

In the first place, the City's counsel are not claiming any authority to destroy any rights. If our construction of this Section is correct, the City is simply enforcing rights reserved to it of which the Company has no right to complain.

In the second place, the claim is not based upon the last seven words in the sense in which that statement is made. Counsel insist that the words "so far as applicable" relate merely to such ordi-

nances as may hereafter be adopted. This we think is a proposition which only needs to be stated to be fully disproved.

Again counsel says:

> "It will be noticed that the words 'hereafter adopted, so far as applicable,' are separated from the rest of the language of this section by the disjunctive 'or,' thus limiting subsequent ordinances which the City is authorized to enact to such only as are applicable to the rights of the Company under the existing ordinances as modified."

We undertake to say that no one ought to seriously consider that the disjunctive "or" is used there to separate all that follows it from what has preceded it. It is clearly used as a disjunctive between the words "now in force" and "hereafter adopted"; while "so far as applicable" relates to all ordinances theretofore mentioned in the Section. This, we think, is so clearly the proper construction, that we need not comment upon it further. If any doubt existed as to the proper construction of this Section with reference to the words "so far as applicable," the resolution of July 19, 1889, which so shortly preceded the Ordinance of September 19, 1890, would resolve those doubts. A portion of this ordinance is quoted on page 126 of counsel's brief, although no reference is made to it in this connection. This resolution was passed with reference to one of the experimental lines. It reads as follows:

> "Be it further resolved that all of the provisions, conditions and limitations contained in

> an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance authorizing and regulating street railways in the City of Minneapolis and all ordinances of said City *so far as applicable*, shall apply to the construction and operation of said cable and electric street railway lines when not modified by the terms of this ordinance."

There the words "so far as applicable" refer specifically to the ordinance of July 17, 1875, and all other ordinances of the City.

This resolution relates to the same subject-matter, and there is precisely the same reason why the words "so far as applicable" as used in the ordinance of 1890 should relate to and qualify all ordinances, whether then in force or thereafter enacted as there is in the resolution of July 19, 1889.

We have already in our former brief, largely anticipated the points which Appellee's counsel have discussed in their briefs with reference to the third point, to-wit, the reserved power of the City Council provided for in Section 8 of the Ordinance of September 19, 1890. We deem it quite unnecessary to further discuss them or to comment upon the authorities which counsel have cited. Before closing, however, we wish to call the Court's attention specifically to the following matters upon which Appellee's counsel have dwelt with considerable emphasis.

(a) They insist that the case of *Detroit v. Detroit Citizens Street Railway Co.*, 184 U. S. 372, is controlling as to the force and effect of the power reserved in said Section 8.

(b) They insist that the issue involved in the mandamus suit in the State Court between the City of Minneapolis and the Minneapolis Street Railway Company involving the validity of the Harvey Transfer Ordinance of July 14, 1893, was merely one of *police power or regulation* and nothing else.

(c) They further insist that Appellant's counsel have misinterpreted and misstated their position with reference to the ordinance of 1875 and the effect of the judgment or decree from which this appeal is taken—even going so far as to imply, if not fairly to intimate, that we have intentionally misstated such position for the purposes of deception.

(d) They insist that for a period of seventeen years (1890 to 1907) the Appellant never *claimed* any such power as it is now claiming under the provisions of the ordinance of September 19, 1890. And that it had never prior to that time, questioned the present contention of counsel as to the force and effect of the Ordinance of July 9, 1875.

These claims of counsel, emphatically stated in their briefs, we will consider in their order.

1. (a) We have already discussed in our former brief the decision of the Court in the case of *Detroit v. Detroit Citizens Street Railway Co.*, 184 U. S., page 368, at pages 196 to 200; and we will here discuss it only with reference to the statements which counsel have made in reference to it.

What counsel have quoted on page 130 of Mr. Muan's brief with reference to the language of the

Tramway Act is merely dictum,—the Court on page 385 of the opinion expressly stating that it is unnecessary to a decision of the case to determine the effect of the provisions of the Tramway Act to which counsel have referred. The Court then proceeds to discuss the matter of fare under the provisions of the Michigan statutes as to whether the fixing of the same is the exercise of a governmental function or of a contractual power.

It holds specifically that the rate of fare was to be fixed by agreement between the street railway companies and the City under express command of the legislature, and that under such circumstances, the rate of fare became a matter of contract. The right to use the streets for street railway purposes was granted by the legislature, subject only to the consent of the municipality.

This Court said:

> "The rate of fare having been fixed by positive agreement under the expressed legislative authority, the subject is not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the *rules* and *regulations* of the running and operation of the road."

The power of the City Council in such matters is made clear by the amendment to Section 34 of the Act of 1867, which is set forth on page 390 of the opinion, to-wit:

> "Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations

> or conditions whereby the rights or franchises granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent and grant named pursuant to the terms thereof."

This amendment is in the plainest terms restrictive and necessarily limits the rules and regulations which the municipality may make. It is a plain interpretation of the previous statutes to the effect that the consideration upon which the consent is given may not be changed, enlarged or increased without the consent of both parties.

This Court expressly held that the Tramway Act of 1861 and 1867 were laws *in pari materia* with the Street Railway Act of 1867, and should, therefore, be construed together to obtain the true legislative meaning (See page 390 of the opinion). This makes it perfectly plain that the decision of the Court was not placed, as counsel seem to intimate, solely upon the language of the Tramway Act, to-wit, "regulations, terms and conditions."

When we come to consider the language of the ordinances which were passed from time to time as the various new lines were constructed, we find the language of such ordinances in the various cases practically identical and invariably being that there is reserved to the common council "the right to make *further rules, orders and regulations,* as may from time to time be deemed by the common council necessary to protect the interests, safety,

welfare or accommodation of the city and public in relation to said railway."

The very language of the ordinances, to-wit, *"further rules, orders and regulations,"* suggest the nature and extent of the same, as held by the Court,—while the power delegated to the municipality is, by the amendment above referred to, expressly limited to the passage of such regulations or conditions as may not destroy or unreasonably impair any of the rights or franchises of the company.

In the case at bar, there are no limitations whatever placed upon the municipality by the legislature as to the nature or extent of the rules, regulations, terms, limitations, conditions or provisions which it may enact. The question is, therefore, entirely unhampered by any consideration of legislative limitations, and must be determined solely from the circumstances under which the ordinance was passed and the language of Section VIII.

It will be noticed also that in the *Detroit* case, this Court adverts to the fact that there had been, for thirty-seven years, a practical construction by both parties of the power thus reserved to the municipality, which, to all intents and purposes, was strictly in accordance with the claims of the Street Railway Company.

It will be noticed that Appellee's counsel discuss the words "regulations, terms and conditions" as used in the Tramway Act, without any reference to the amendment of 1867 by which those words are, in express terms, restricted in their meaning to such

only as may not destroy or unreasonably impair the rights and franchises of the company.

When Appellee's counsel come to consider the reservations contained in the various ordinances set forth in the *Detroit* case, they simply assert that such reservations are **"similar to that in the ordinance of September 19, 1890."** And yet an examination of the various ordinances as counsel have set them forth in their briefs and as they are set forth in the report of the *Detroit* case, will show at a glance that the terms there used are necessarily restrictive, while those used in the ordinance of September 19, 1890, are exceedingly broad and comprehensive.

We respectfully submit that in no view of the *Detroit* case, can it be said that it is conclusively in favor of Appellee's contentions here. In many, if not most of its essential details it is radically different and easily distinguishable.

It is difficult, if not quite impossible, to maintain that in a given instance any precedent is absolutely in point in all particulars. Any slight difference may completely distinguish one case from another. This is true both as to whether or not there is a contract and as to whether or not there is a reserved power to alter or change the contract.

The language of Mr. Justice Moody, in the case of *Home Telephone Co. v. Los Angeles*, 211 U. S., page 264, is peculiarly in point here. It is as follows:

> "It is obvious that no case, unless it is identical in its facts, can serve as a controlling pre-

> cedent for another for differences, slight in themselves, may through their relation with other facts, turn the balance one way or the other."

II. (b) The present contention of Appellee's counsel with reference to the issues involved in the mandamus case, brought by the City of Minneapolis against the Minneapolis Street Railway Company, in 1893, to test the validity of the so-called Harvey Ordinance of July 14, 1893, will be effectually disposed of by an examination of the pleadings in that case, the findings of fact and conclusions of law and memorandum of the learned Judge of the State District Court who heard and determined the case. These are set forth in full on pages 54 to 115 of the Transcript of Record.

It seems to us that Appellee's counsel is not wholly frank in discussing what, in fact, was claimed on behalf of the City in that action, and what was most emphatically contended for by the Minneapolis Street Railway Company. This matter is discussed in Mr. Munn's brief on pages 144 to 147. On page 145 counsel says:

> "The City claimed the right to enforce this ordinance" (Harvey Transfer Ordinance) "on the ground that it was a *proper police regulation*, and related to the manner of 'operating' the cars of the Company, as provided in Section 8 of the ordinance of September 19, 1890."

Counsel also state that the decision of the Lower Court was placed upon the ground that such ordinance was a proper police regulation, thus leaving

it to be inferred that this was the only issue involved in that case. An examination of the pleadings will show that the City claimed that it had the right to pass the ordinance under the power reserved to it in Section 8,—while the defendant's answer demonstrates beyond the possibility of a doubt that it claimed that the matter of transfers was specifically provided for in the ordinance of 1890, and thus became a contract between it and the City and that it could not be changed except with its consent.

We have already called the Court's attention to the particular paragraphs in the defendant's answer, setting forth in detail these claims made on its behalf.

The learned Judge of the Lower Court held in passing that the ordinance could be sustained as a police regulation, but also held that the reservation contained in Section 8 was broad and comprehensive and should be construed to reserve powers and rights beyond mere police regulations, which, he added, the Street Railway Company would be subject to, regardless of whether any reservation was made or not (See page 110, Transcript of Record).

On page 146 of Mr. Munn's brief this statement appears:

> "A comparison of the provisions of this ordiance of July 14, 1893, with the provisions of Section 6 of the September 19, 1890, ordinance, relating to the same subject, shows that the only material difference relates to the place at which the transfer shall be issued."

We are constrained to say that this statement is wholly incorrect and positively misleading. It seems utterly impossible to say that the ordinance of July 14, 1893, is not a **radical departure from,** and a **most material enlargement of,** the transfer provisions contained in the Ordinance of September 19, 1890. It extended the benefits of the transfer system to thousands of people who could not have availed themselves of it under the provisions of the 1890 ordinance. Under the old ordinance, transfers could only be demanded at **"the junction of said lines at Washington and Hennepin Avenues"** (See Section 6, page 20, Transcript of Record). While by the provisions of the *Harvey Ordinance of July* 14, 1893, the street railway company was required,

> *"to deliver at the* **junction or intersection of any of its lines within the City of Minneapolis,** *a transfer to any passenger demanding the same and who shall pay one full fare, which transfer shall entitle the passenger so receiving the same to a continuous passage on the line so intersected, joined or connected with. Said transfer shall be issued to said passenger by the conductor or other agent of said Company and from and upon the car on which said passenger has paid his full fare."*

But this is not all. The Harvey Ordinance not only provided for transfers to be issued at *all junctions* and *intersections* other than that of Washington and Hennepin Avenues, but it also provided as follows:

> "If any of the railway lines of said company do not intersect or connect with all the lines of said Company in said City, then transfers shall

be issued in the manner hereinbefore set forth from the cars operated on said non-intersecting and non-connecting lines to such other *lines* at the point where said cars *nearest approach the intersection of Washington and Hennepin Avenues in said City.*"

No one can compare these two ordinances without seeing what a radical change was thus made in the transfer system. The suggestion of counsel that it was a *mere regulation touching* the *manner* of giving transfers, ignores the really substantial parts of the amendment. It not only changed the *method of giving transfers,* to-wit, compelling the conductors to issue the same, but it required transfers to be given to passengers who, under the old ordinance, *would have no right whatever to demand them,—thus materially increasing, probably doubling* if not *trebling* or *quadrupling,* the number of transfers which the company would be required to issue.

On top of page 67, Transcript of Record, in the information filed by the City against the Minneapolis Street Railway Company, it appears that there were, in 1893, **thirty-four other and different points** in said City where, under the Harvey Ordinance, transfers were required to be given, *other* than the **junction of Hennepin and Washington Avenues** which was the **only point** provided for in the ordinance of September 19, 1890.

The Harvey Ordinance provided not only for the *intersections* or *junctions* then existing, but for all future junctions or intersections, which have ma-

terially increased in number since the passage of the ordinance.

It seems more than merely evasive for counsel to refer to the Harvey Ordinance as simply *"regulatory."* The necessary effect of that ordinance was to *increase the rights* of the public as against the Street Railway Company. It *increased* the obligations of the Street Railway Company towards the public. It "lengthened" many of the rides to which the passenger became entitled. It prevented the Company from collecting two fares, while under the ordinance of 1890 it would clearly have been entitled to them. No one can possibly gainsay the inevitable effect of that ordinance in the directions we have suggested.

As to the effect of such ordinance, we call the Court's attention to the case of *Detroit v. United Railway Co.,* decided by the Supreme Court of Michigan on May 26, 1909, and reported in the 121 N. W. Rep., page 321. There it was distinctly held that, where, in a franchise which the municipality was authorized by the legislature to grant, specific provisions were made for the issuance of transfers, the City could not afterwards provide for other and different transfers, because such provision would be a violation or impairment of the contract contained in the franchise.

This is precisely the position which the Minneapolis Street Railway Company took in reference to the Harvey Ordinance of July 14, 1893. This ordinance was passed by the City Council on the date mentioned, and went to the then Mayor of the City

of Minneapolis, the Honorable Wm. H. Eustis, who, on July 25, 1893, returned it to the City Council without his approval in a message to the Council stating the grounds upon which he disapproved of the ordinance. He adopted *in toto* the contentions of the Minneapolis Street Railway Company with reference to the validity of this ordinance. In his message to the City Council he said:

> *"The proposed ordinance provides for transfers at every intersection and junction of the various lines of street railway in the City. This very largely increases the number of points at which the transfers are to be had. In my judgment, this is not regulating the right to transfers which the City possesses. It is creating a new right. The City Council has no authority to require the giving of a transfer at any other point not designated and provided for in the December ordinance any more than it would have to compel the giving of transfers had there been no agreement on this subject between the parties interested. There is a vast difference between regulating the mode of issuing transfers at the points mutually agreed upon between the Company and the City and the arbitrary requiring on the part of the City of the issuance of transfers at other points. The compact between the Company and the City is clear and distinct on the points at which the transfers are to be issued."*

No statement could probably better present in clear and concise language the position which the Minneapolis Street Railway Company took in reference to the right and power of the City to enact the Harvey Ordinance, than is here made by the then Mayor of the City of Minneapolis. Upon the

return of the Harvey Ordinance without the approval of the Mayor, the same was passed by more than two-thirds vote of the City Council, and thus became, under the City charter, a valid ordinance without the Mayor's approval.

This is the ordinance which is involved in the litigation between the City of Minneapolis and the Minneapolis Street Railway Company in the State District Court, to which reference has been made, the pleadings and the decision of the Court in which appear in the Transcript of Record in this case.

It seems to us to be utterly idle for the Appellee's counsel to claim that the Harvey Ordinance was merely regulatory in its nature and the exercise only of the so-called police power. Such a contention is utterly opposed to what the Minneapolis Street Railway Company contended for in that case, as is conclusively shown by its answer, which fully appears here in the Transcript of Record, and its attitude before the City Council and the Mayor during the passage of the ordinance.

III. (c) This brings us to briefly consider the contention of counsel with reference to what they term a mis-statement of Appellee's contention with reference to their claim in regard to the ordinance of 1875.

On bottom of page 141 of Mr. Munn's brief, Appellee's counsel say:

> "Counsel for the City assert, and many times reiterate, in their brief, that the Company claims that the so-called motive power ordinances continue the provisions of Section 8 of

the 1875 ordinance unmodified, thus giving the Company the right to charge five cents for one 'continuous ride of not more than three miles in length.' "

With reference to this counsel further say:

"This assertion on the part of the City is absolutely foundationless, unjustifiable and unfair in every sense."

They further add (See top of page 142 of Mr. Munn's brief):

"Counsel can have but one purpose in view in making it, and that is to create in the minds of the Court an incorrect and prejudicial impression, forgetting in their zeal the character of the Court before whom it is made."

The implications, if not the plain intimations, contained in the foregoing quotations from Appellee's brief, would perhaps be serious if there was the slightest foundation for any of them. What counsel have, in fact, said in this regard, conclusively demonstrates that the judgment appealed from in this case is clearly erroneous, if their statements are to be accepted as binding in this matter.

A complete answer to all that counsel have directly or indirectly charged is found in the express language of the judgment or decree appealed from. From the judgment or decree, which appears on pages 134 and 135 of the Transcript of Record, we quote the following:

"It is further ordered, adjudged and decreed that the ordinance of the City of Minneapolis passed on July 9, 1875, *and the ordinance of the City of Minneapolis passed on July* 8, 1878,

as ratified and confirmed by the legislature of the State of Minnesota on the 4th day of March, 1879, *constitute a contract between complainant and respondent for and during the terms of complainant's charter as alleged in said Amended Bill;* **and that complainant is entitled to collect five cents from each passenger riding upon its cars as provided in said ordinance of July 9, 1875."**

This paragraph of the judgment, it will be noticed, is definite and absolute and contains no reference whatever to anything but the ordinance of July 9, 1875, and the one of July 8, 1878 (which latter relates merely to the so-called motor line). No reference whatever is contained in this paragraph to the later ordinances with reference to transfers; and it is impossible to see how counsel can consistently claim that this judgment and decree is not conclusive upon all of its alleged rights against the City as set forth in the ordinance of 1875 and the special ordinance of 1878. **There is not the slightest qualification or modification of these ordinances contained in the judgment.**

This judgment conclusively determines that the Appellee is entitled to charge five cents for each passenger for each continous ride, and that a continuous ride could not be made to exceed three miles in length, precisely as described in Section 8 of the ordinance of 1875.

If counsel's statements which we have just quoted are to be accepted as admissions in this case, the judgment must, of necessity, be reversed as obviously erroneous. The only reference which is made

to the final ordinance of September 19, 1890, and the experimental resolutions passed just previously thereto, is contained in another paragraph of the judgment, and the effect of these resolutions and ordinance is conclusively determined to be that the Appellee **"is authorized to operate its cars upon all its lines of street railway in the City of Minneapolis for and during the term of its charter, by electricity as a motive power, as alleged in said Amended Bill."**

In view of these express, explicit and unambiguous provisions of the judgment and decree, we fail to see how counsel can claim that we have misstated their contentions in reference to the force and effect of the ordinances of 1875 and of 1890.

We assumed, and supposed rightly, that counsel would undertake to support the judgment and decree appealed from. And about the terms and the conclusive and binding effect of the express language of that judgment and decree, there can be no possible doubt. What this judgment and decree actually determines will, undoubtedly, have to be solved from its own language rather than from any statements which counsel may, for any reason, deem it expedient to make.

The judgment must speak for itself, and we think it is perfectly obvious that we have not in the slightest degree misstated or exaggerated the effect of such judgment and decree. As before stated, if counsel's present contention is to be accepted, the judgment is palpably erroneous. We could not anticipate that counsel would not attempt to

support the inevitable effect of the judgment and decree which has been rendered in favor of their client.

IV. (d) On page 148 of Mr. Munn's brief there are some **startling** statements made as to the previous claims of the City.

Counsel there say:

> "From 1890 down to 1907, a period of seventeen years, the City never intimated that it claimed the power it now seeks to exercise under this clause of the ordinance of September 19, 1890. Nor did the City during that time ever question the existence of this contract and ordinance of July 9, 1875, in all its terms and provisions excepting as to motive power, and the issuance of a transfer."

This we insist is startling, **because it is not only incorrect, but is opposed to the express allegations contained in Appellant's answer which are admitted to their fullest extent by the Appellee.**

As before stated, this case was heard on Amended Bill and Answer and stipulation of the parties —the stipulation in no respect touching or modifying the effect of the allegation to which we here call the attention of the Court.

Paragraph 8 of the Appellant's answer, appears on page 42, Transcript of Record, and is as follows:

> "Respondent admits and alleges that it **now claims, and ever since the passage of the Ordinance of September 19, 1890, has claimed,** that it has the absolute right to **regulate, control, reduce or otherwise change the amount or rate of fare to be charged by this complainant for each passenger riding upon its electric street railway lines,** and that it has such absolute

> right, power and authority to reduce such amount or rate of fare below five cents, and that it has such right, power and authority to so regulate, control, reduce or otherwise change such amount or rate of fare without this complainant's consent; and that such right, power or authority is fully delegated to it from the Legislature of the State of Minnesota by its charter, and also reserved to it by the express terms of the said Ordinance of September 19, 1890."

These are all allegations of fact, and it is difficult, and we may add impossible, to conceive how the Appellant could have expressed in plainer and more unambiguous language the fact that it has always claimed the right and powers which it exercised in 1907, than it has so expressed it in these allegations of its answer, which, for the purposes of this case, are conclusively admitted.

Again counsel says in this same connection and on the same page:

> "On the contrary, the City has repeatedly recognized its existence; has ordered this Company to build miles upon miles of new lines and to equip and operate them, as it claims the power to do, under this ordinance of 1875."

This statement is not merely inaccurate. It is positively incorrect. There is not in the entire Record any evidence in the slightest degree suggesting that the City, after the passage of the Ordinance of September 19, 1890, recognized the continued existence of the ordinance of 1875. And the reference which counsel has made in the latter part of the last quotation merely relates to the two ordinances passed at the request of the Appellee af-

ter the commencement of this litigation. In none of the previous ordinances appearing in the Record, by which extensions or new lines were ordered, is there any reference to the old ordinance of 1875.

This reference, as we have before stated, to the ordinance of 1875, contained in the resolutions of April, 1907, after the commencement of this action, was evidently inserted by design and is the only possible basis for the present contention of the counsel that the City of Minneapolis has continually recognized the existence and validity of the old ordinance of 1875 as applicable to the new electric street railway lines.

There is absolutely nothing whatever in the present contention of Appellant with reference to the ordinance of September 19, 1890, which was not asserted by it in the most definite and specific form in the litigation following the passage of the Harvey Ordinance of July 14, 1893. The contention of the City was then sustained by the State District Court **and finally acquiesced in by the Minneapolis Street Railway Company without appeal.**

This contention on the part of the City is, as we have before stated, expressly admitted for all purposes involved in this case,—the same having been expressly set forth in the answer and being undenied. The Transcript of Record in this case conclusively shows that it is the Appellee and not the Appellant which has been entertaining and endeavoring to sustain conflicting and inconsistent positions with reference to the ordinance in question.

While it may be wholly unnecessary to notice the many intimations contained in Appellee's briefs to the effect that the City of Minneapolis is attempting to repudiate its obligations towards the Minneapolis Street Railway Company, and is guilty of bad faith in that respect, we think it may not be out of place to add a few words in reference to such intimations.

As early as 1890, the Company's horse street railway system was obsolete and inadequate to the needs of the City, and practically worthless. As an investment it was, at that time, little better than junk. Neither the roadbeds and rails nor cars were suitable for modern use. Other companies were seeking to obtain permits or licenses to construct and operate electric lines in the City. The City claimed then, and claims now, that it had the undoubted right to grant such permits or licenses for the purpose of constructing and operating electric street railway lines. As we have before stated, the City Council came within one vote of granting such permit or license to another company. Under these circumstances, the Minneapolis Street Railway Company sought the permission of the City Council to construct an electric system.

The various resolutions permitting experiments in this direction, finally culminated on September 19, 1890, in the ordinance to which reference has been so frequently made.

As early as July 25, 1887, the Supreme Court of Minnesota had held that a municipal corporation entrusted with the general power of control over

public streets, could not, by contract or otherwise, irrevocably surrender any part of such power, without the explicit consent of the legislature, because such power was held in the nature of a trust by the municipality for the State.

This doctrine was announced in the case of *Nash v. Lowry*, 37 Minn. 261. The defendant in that case was Mr. Thomas Lowry, who practically originated the Minneapolis street railway system, and continued for more than a quarter of a century, until the time of his death in 1909, as the head and front of that system.

With the law thus announced, and with the limitations upon the power of the City Council, well understood by the legal profession, the Minneapolis Street Railway Company was glad to accept the Ordinance of September 19, 1890, which was simply a permit or license, so far as the City was concerned, and not an irrevocable grant or contract.

Within less than three years after the passage of that ordinance, the City Council passed the Harvey Transfer Ordinance. In the litigation which followed the passage of that ordinance, the claims of the City with reference to its reserved power, were most explicitly set forth, and fully sustained by the decision of the State District Court.

The Minneapolis Street Railway Company, without an appeal from that decision, finally acquiesced therein, and put into effect, and has since maintained, a transfer system which bears but the slightest resemblance to that originally provided for in the Ordinance of September 19, 1890.

From that time down to the present, the City has always claimed and maintained that under the reserved power contained in the ordinance of 1890, it could regulate, fix, determine and reduce the rate of fare to be charged upon the electric street railway system.

As before stated, these claims and contentions on its part are distinctly set forth in its answer in paragraph 8, page 42, Transcript of Record. These allegations are undenied and stand as verities in this case.

On page 41, Transcript of Record, of Appellant's answer, it is specifically denied, "that the said complainant constructed, maintained or operated its electric lines of street railway in said City of Minneapolis in reliance upon any supposed right under said ordinance of July 9, 1875, to charge five cents for each passenger riding upon its said lines; and alleges that the said complainant accepted and consented to all of said ordinance of September 19, 1890, and by its acceptance of and consent to said ordinance, agreed that this respondent should at all times have and reserve to itself the right to regulate, reduce or otherwise change the rate of fare to be charged by complainant to passengers upon its said electric street railway lines."

These allegations stand admitted upon the record. In view of the admitted facts in this case, it ought to be impossible for Appellee to advance any valid argument based upon any so-called inequitable consequences which they may conceive will follow from sustaining Appellant's contentions.

The questions in this case, we submit, are strictly legal ones. The Appellant's present contentions are perfectly consistent with those which it has always maintained. There is not now, nor has there been, any change in its attitude toward the Appellee,—while it conclusively appears that the present claim of Appellee's counsel, with reference to the nature and effect of the Ordinance of September 19, 1890, is radically different from, if not diametrically opposed to the claims which they advanced in the mandamus proceedings in the State District Court, to which reference has been made.

If, therefore, the term of the original charter of the Minneapolis Street Railway Company was thirty years, then whatever the effect of the ordinances in question, Appellee's rights expired by limitation in 1903.

If, on the other hand, the term of its charter should be held to be fifty years, in order to prevail in this action, it must show a valid and binding contract between it and the City with reference to the electric street railway line by which the City bound itself not to reduce the rate of fare on such electric railway system below the sum of five cents for a continuous ride of not exceeding three miles in length, as provided in the original ordinance of July 9, 1875.

And furthermore, even though there were a contract such as Appellee claims, it must still be held, in order to affirm this judgment and decree, that the reservations of power contained in Section 8 of the Ordinance of September 19, 1890, are practical-

ly meaningless and do not reach the matter of fare.

These considerations are all submitted with reference to the merits of this controversy.

We may add further that in any view of this case, the judgment appealed from is palpably erroneous according to the express claims of counsel, inasmuch as that judgment makes definite and absolute and without qualifications the alleged rights of the Appellee to charge five cents for a continuous ride of not exceeding three miles in length, as provided in the original ordinance of July 9, 1875.

And still further it is erroneous, according to the express claims of counsel presented in their briefs, because it makes absolute the right of this Appellee to construct, maintain and operate an electric street railway line in the streets of the City of Minneapolis for and during the term of Appellee's charter, as **a matter of contract as alleged in the Amended Bill,** notwithstanding counsel now claim that the Ordinance of September 19, 1890, was a mere *regulatory* ordinance.

Respectfully submitted,

FRANK HEALY,
City Attorney and Solicitor for Appellant.

WM. A. LANCASTER,
JOHN F. MCGEE,
Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 44.

THE CITY OF MINNEAPOLIS,

Appellant

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,

Appellee.

Office Supreme Court, U. S.
FILED
NOV 9 1909
JAMES H. McKENNEY,

Supplemental Brief.

(Copy of Laws and Statutes.)

N. M. Tenney,
Solicitor for Appellee.

M. B. Koon,
Of counsel for Appellee.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 46.

THE CITY OF MINNEAPOLIS,

Appellant.

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,

Appellee.

Supplemental Brief.

In this supplemental brief we shall print copies of the statutes which we deem are essential in determining whether the Minneapolis Street Railway Company was organized under Title I or Title II of Chapter 34, R. S. 1866.

Chapter 55 of the General Laws of Minnesota 1858 (see page 127 thereof) became Sections 299 to 333 of the Compiled Statutes of 1858 (see pages 330 to 334). On the margin of each Section we have given also the section number appearing in the Compiled Statutes of 1858. We have also printed in full Chapter 34 of the Commissioners' Report to revise the Statutes of 1866. On the margin of each section of the Commissioners' report we have given the source of the particular section. "C. S." means Compiled Statutes of 1858. This section number of the Compiled Statutes is printed on the margin of the general laws printed herein.

TITLE I, CHAPTER 34, PAGE 263, REVISED STATUTES 1866.

OF CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

"Section 1. Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slack-water navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein."

"Sec. 2. They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be and also in the office of the secretary of state, in books kept for such purposes."

"Sec. 3. Said articles shall contain:

First. The name of the corporation, the general nature of its business and the principal place, if any, of transacting the same.

Second. The time of commencement and the period of continuance of said corporation.

Third. The amount of capital stock of said corporation and how to be paid in.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject.

Fifth. The names and places of residence of the persons forming such association for incorporation.

Sixth. The names of the first board of directors and in what officers or persons the government of the corporation and the management

of its affairs shall be vested, and when the same are elected.

Seventh. The number and amount of the shares in the capital stock of said corporation.

And shall be published for four successive weeks in some newspaper printed and published at the capital of the state.

Sec. 4. * * *

"Sec. 5. No such corporation shall be formed to continue more than fifty years in the first instance, but it may be renewed from time to time for periods not longer than fifty years: *Provided*, that three-fourths of the votes cast at any regular election for the purpose, are in favor of such renewal, and those desiring a renewal purchase the stock of those opposed thereto at its current value.

* * *

"Sec. 13. Any corporation organized or reorganized under the provisions of this title, may obtain the right-of-way, over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites and grounds for depots, shops and other buildings requisite for the proper carrying on of the business to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices or other erection necessary for the convenient prosecution of their enterprise, all and any lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property, and to canal in and along the valley of any such river, stream, lake or watercourse, and to purchase and erect all necessary buildings for the opera-

tion and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this title provided.

* * *

"Sec. 29. If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals."

TITLE II, PAGE 272, REVISED STATUTES 1866.

OF CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE I.

"Sec. 45. Any number of persons NOT LESS THAN THREE, who shall, by articles of agreement in writing, associate according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical or chemical business, and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of association; *Provided,* no company shall take a name previously assumed by any other company."

"46. * * *

"Sec. 47. The amount of capital stock in every such corporation shall in no case be less than TEN THOUSAND DOLLARS, nor more than FIVE HUNDRED THOUSAND DOLLARS, and SHALL BE DIVIDED INTO SHARES OF FIFTY DOLLARS EACH; but the capital stock and number of shares may be increased at any regular meeting of the stockholders; *Provided,* the amount of capital when so increased, shall not exceed the sum of five hundred thousand dollars."

* * *

"Sec. 52. No corporation shall be formed under this title to continue MORE THAN THIRTY YEARS."

CHAPTER 350 (G. L. 1899).

AN ACT PROVIDING FOR CONDEMNATION OF RIGHT OF WAY BY STREET RAILWAY COMPANIES IN CERTAIN CASES.

Be it enacted by the Legislature of the State of Minnesota:

"Section 1. Any corporation organized under the laws of this state, for the purpose of constructing a street railway in this state, wholly or partly without the limits of any city or cities, shall have the right to acquire and occupy private right of way throughout any portion of its route outside the limits of any city or cities, whenever deemed necessary by such corporation, and for that purpose shall have the power to exercise the right of eminent domain, including the crossing of intervening highways when necessary, and the provisions of section twenty-six hundred and five (2605) to twenty-six hundred and sixteen (2616), both inclusive, and section twenty-six hundred and forty-two (2642) Statutes of Minnesota eighteen hundred and ninety-four (1894) so far as consistent herewith, shall apply to and govern the exercise of such right."

"Sec. 2. This act shall take effect and be in force from and after its passage.

"Approved April 20th, 1899."

This chapter was repealed by section 5543, chapter 108, Revised Laws 1905 and was not re-enacted in chapter 58 of the R. L. 1905, with the possible exception that the saving proviso of Section 2842, "Provided that no street railway company shall have or exercise such right within any city or village," contains part of the sense of the chapter.

The Suburban Company did not get its power to condemn property from that chapter. Counsel apparently intend to give that impression at page 110. If they had quoted the next sentence of the decision the court would have seen that the statement was erroneous. Following the quotation made by counsel on page 110 our court says:

> "This chapter was expressly repealed by R. L. 1905 but the right to exercise the power was reserved to such companies by section 2841."

Section 2841 was section 2592 of the General Statutes of 1894. At the foot of section 2841 are found in brackets the numbers 2592, which refer to the section of the General Statutes of 1894 from which Section 2841 was taken.

GENERAL LAWS MINNESOTA 1875, CHAPTER XIV, PAGE 50.

AN ACT TO AMEND TITLE ONE (1) OF CHAPTER THIRTY-FOUR (34) OF THE GENERAL STATUTES RELATING TO CORPORATIONS, BEING TITLE ONE OF CHAPTER SEVENTEEN OF THE STATUTES AT LARGE.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That Section one (1) of Title I (1) of chapter thirty-four (34), relating to corporations, be and the same is amended by adding thereto the following, to-wit: and that any citizens of the United States not less than nine (9) in number, being the owner or owners of any railroad within this state now or hereafter ACTUALLY CONSTRUCTED FOR PUBLIC USE IN THE CONVEYANCE OF PERSONS OR PROPERTY, or organized for the purpose of maintaining and operating under lease or contract a railroad constructed for like public uses, may by making and filing articles of association as authorized by this act, acquire and enjoy the rights, privileges and franchises granted by this act, and may by filing in the office of the Secretary of State a resolution of such corporation of its intent to construct or operate any branch line, become empowered to so construct and operate the same in connection with such main line; subject to the provisions of this act and the general laws of this state. That any such railroad corporation to be organized under this act may

erect and maintain lines of telegraph along or over its lines of railroad, and charge a reasonable compenstion for transmitting messages over the same.

Sec. 2. That section five (5) of said chapter thirty-four (34) be and the same is amended by adding to said section the following, viz: *Provided,* That railroad corporations formed in pursuance of the provisions of this chapter, may continue and be formed FOR ANY TIME the corporators may designate or provide in the articles of association.

CHAPTER 18, GENERAL LAWS 1885, PAGE 32.

AN ACT TO AMEND SECTIONS ONE (1) AND THIRTEEN (13) OF CHAPTER THIRTY-FOUR (34), TITLE I (1) OF THE GENERAL STATUTES OF ONE THOUSAND EIGHT HUNDRED AND SEVENTY-EIGHT (1878) RELATING TO CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Sections one (1) and thirteen (13) of Title one (1) of chapter thirty-four (34) of the general statutes of one thousand eight hundred and seventy-eight (1878) are hereby amended by adding next after the word "river" wherever the same occurs in either of said sections, the word "bay."

Section 2. This act shall take effect and be in force from and after its passage.

Approved March 9, 1885.

CHAPTER 161, GENERAL LAWS MINNESOTA 1887.

AN ACT TO AMEND SECTION ONE (1) AND THIRTEEN (13) OF TITLE ONE (1) OF CHAPTER THIRTY-FOUR (34) OF GENERAL STATUTES OF EIGHTEEN HUNDRED AND SEVENTY-EIGHT (1878) RELATIVE TO CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one (1) of Title one (1) of Chapter thirty-four (34) of general statutes of eighteen hundred and seventy-eight (1878) be and the same is hereby amended by inserting after the word "telegraphs" in the third (3) line thereof the words "pneumatic tube lines, subway conduits for the passage, operation and repair of electric and other lines of pipes."

That section Thirteen (13) of said title and chapter be and the same is hereby amended by inserting after the word "over" in the second line thereof the words "through, under" and by inserting after the word "telegraph" in the third (3) line thereof the words "pneumatic tube lines, subway conduits for the passage, operation and repair of electric and other lines and pipes."

Sec. 3. That this act shall take effect and be in force from and after its passage.

Approved March 7, 1887.

GENERAL LAWS MINN. 1889, CHAPTER 221, PAGE 350.

CHAPTER 221.

AN ACT TO AMEND TITLE ONE (1) OF CHAPTER THIRTY-FOUR (34) OF THE GENERAL STATUTES ONE THOUSAND EIGHT HUNDRED AND SEVENTY-EIGHT (1878), RELATING TO CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one (1) of title one (1) of chapter thirty-four (34) of the general statutes of eighteen hundred and seventy-eight (1878) be and the same is hereby amended by inserting before the word "navigation" in the fourth (4th) line of said section the words "or other."

Sec. 2. That said title one (1) of chapter thirty-four (34) be further amended by adding thereto the following. Any corporation formed under this title in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluice-ways, booms of all kinds, side rolling, sluicing and flooding dams or otherwise if necessary, but shall in no case, in any manner, materially obstruct or impede navigation upon such stream or erect any dam or other obstruction below the head of steamboat navigation, etc.

CHAPTER 74 GENERAL LAWS OF 1893.

AN ACT TO AMEND SECTIONS 1 AND 40 OF TITLE ONE OF CHAPTER THIRTY-FOUR OF THE GENERAL STATUTES OF 1866 RELATING TO CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one of title one of chapter thirty-four of General Statutes, 1866, be and the same is hereby amended so as to read as follows, that is to say:

Section 1. Any number of persons, not less than five, may associate for incorporation and become incorporated under and according to this title for the construction, maintenance and operation of any work or works of internal improvement requiring the taking of private property, or any easement therein, for public use, including railways, telegraph lines, canals, slack water or other navigation upon any water course, bay or lake, dams to improve or create a water supply or power for public use, and any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power; and any citizens of the United States, not less than nine in number owning any RAILWAY now or hereafter constructed for public use within this state for transportation of persons or property, or organized for the purpose of maintaining and operating under any lease or contract a railroad constructed for like public use, may, by making and

filing articles of association under and according to this title, acquire and enjoy the rights, powers, privileges and franchises hereinafter granted and may, by filing in the office of the secretary of state a resolution of such corporation expressing its intent to construct, maintain and operate any branch line, become empowered to construct, maintain and operate the same in connection with its main line, subject, however, to the provisions of this title and the general laws of this state, and any corporation formed hereunder may construct, maintain and operate telegraph lines along or over its lines of railroad, and any corporation formed hereunder or under any act hereby amended, may charge and collect a reasonable compensation for its service. But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village a RAILWAY OF ANY KIND or any subway, pipe-line or other conduit for supplying the public with water, gas light, electric light, heat, power or transportation, or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making just compensation therefor, as herein provided.

PROVIDED, THAT THE STATE OF MINNESOTA SHALL AT ALL TIMES HAVE FULL POWER AND AUTHORITY TO SUPERVISE AND REGULATE THE BUSINESS METHODS AND MANAGEMENT OF ANY CORPORATION EXISTING AND OPERATING HEREUNDER, AND SHALL ALSO HAVE

FULL POWER AND AUTHORITY AT ALL TIMES TO FIX THE COMPENSATION WHICH SHALL OR MAY BE CHARGED OR RECEIVED BY ANY CORPORATION EXISTING AND OPERATING HEREUNDER. AND ANY CORPORATION ORGANIZED UNDER THIS ACT SHALL BE SUBJECT TO ANY CONDITION FROM TIME TO TIME IMPOSED BY SUCH VILLAGE OR CITY, THROUGH ITS BOARD OF TRUSTEES OR CITY COUNCIL. And *Provided Further*, that the common council of any city and the board of trustees of any village at the end of each and every five years from and after the granting of any franchise for the construction of any STREET RAILWAY, TELEPHONE, waterworks, gas and electric light, heat or power works, or any or all of them, shall have the right, when authorized so to do by a two-thirds vote of the electors of such municipality as hereinafter provided, to acquire the same by purchase and thereafter operate the same, upon paying to the company, corporation or person owning the franchise the full and true cost and value thereof, to be determined by the usual proceedings for acquiring public property for public use under the right of eminent domain upon petition of the authorities of such municipalities, except that none of the commissioners so appointed to appraise the same shall be residents of said municipality, and except further that all the property, if any thereof, owned by the corporation in interest under and in connection with said franchise shall be included in such proceeding and purchased and acquired hereunder.

Before any such property shall be acquired by any municipality or such proceedings be instituted the proposition to acquire the same shall be submitted to a vote of the electors of said municipality at a special election called for that purpose within the three months immediately prior to the expiration of any five years of said franchise and then only when authorized by two-thirds of the votes cast at said election.

The consideration paid for any such works or property acquired under this provision shall be first applied to the payment of any bonds upon the property or works acquired and the balance if any to the person, company or corporation owning said franchise.

Sec. 2. * * *

Sec. 3. * * *

CHAPTER LV, GENERAL LAWS 1858 (PAGE 127).

AN ACT TO PROVIDE FOR THE CREATION AND REGULATION OF CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

CHAPTER I.

OF CORPORATIONS FOR PECUNIARY PROFIT.

Sec. 299, C. S. 1858

Section 1. Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of Canals, Railways, Telegraphs, or other works of internal improvement; but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided.

(This became Sec. 1, Ch. 34, Title I, R. S. 1866).

Sec. 300, C. S. 1858

Sec. 2. Among the powers of such body corporate are the following:

First: To have perpertual succession.

Second: To sue and be sued by its corporate name.

Third: To have a common seal which it may alter at pleasure.

Fourth: To render the interest of the stockholders transferable.

Fifth: To exempt the private property of its members from liability for corporate debts, except as herein otherwise declared.

Sixth: To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs, in accordance with law and not incompatible with an honest purpose.

Sec. 3. Previous to commencing any business except that of their own organization, they must adopt articles of incorporation, which must be recorded in the office of the Register of Deeds of the county where the principal place of business is to be, in a book kept therefor. Sec. 301, C. S. 1858

(This section amended became Sec. 2, Title I, Ch. 34, R. S. 1866).

Sec. 4. Corporations for the construction of any work of internal improvement, must in addition also file a copy of such articles in the office of the Secretary of State, and have the same recorded by him in a book kept for such purposes. Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of the risks of insurance companies, exceed two-thirds of its capital stock. Sec. 302, C. S. 1858

Sec. 5. A notice must also be published for four weeks in succession in some newspaper as convenient as practicable to the principal place of business. Sec. 303, C. S. 1858

Sec. 6. Such notice must contain: Sec. 304, C. S. 1858

First: The name of the corporation and its principal place of transacting business.

Second: The general nature of the business to be transacted.

Third: The amount of capital and stock authorized, and the times and condition on which it is to be paid in.

Fourth: The time of the commencement and termination of the corporation.

Fifth: By what officers or persons the affairs of the company are to be conducted, and the times at which they will be elected.

Sixth: The highest amount of indebtedness or liability to which the corporation is at any time to subject itself.

Seventh: Whether private property is to be exempt from the corporate debts.

Sec. 305, C. S. 1858

Sec. 7. The corporation may commence business as soon as the articles are filed in the office of the Register of Deeds, and their doings shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, when such filing is necessary, within three months from such filing in the Register's office.

Sec. 306, C. S. 1858

Sec. 8. No change in any of the above matters shall be valid unless recorded and published as the original articles are required to be.

Sec. 307, C. S. 1858

Sec. 9. Corporations for the construction of any work of internal improvement may be formed to endure FIFTY YEARS; those formed for other purposes cannot EXCEED TWENTY YEARS in duration; but in either case they may be renewed from time to time, for periods not greater, respectively, than was at first permissible; *Provided,* three-fourth of the votes cast at any regular election for the purpose, be in favor of such renewals; *And pro-*

vided, also, That those thus wishing a renewal will purchase the stock of those opposed to the renewal at its fair current value.

Sec. 10. The corporation cannot be dissolved prior to the period fixed upon in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles. Sec. 308, C. S. 1858

Sec. 11. The same period of newspaper publication must precede any such premature dissolution of a corporation, as is required at its creation. Sec. 309, C. S. 1858

Sec. 12. A copy of the by-laws of the corporation with the names of all its officers appended thereto, must be posted in the principal place of business and be subject to public inspections. Sec. 310, C. S. 1858

(This became Sec. 6, Title I, Chap. 34, R. S. 1866).

Sec. 13. A statement of the amount of the capital stock subscribed, the amount of capital actually paid in, and the amount of indebtedness of the company in a general way, must also be kept posted up in like manner, which statement must be corrected as often as any material change takes place in relation to any part of the subject matter of such statement. Sec. 311, C. S. 1858

(This became Sec. 7, Ch. 34, Title I, R. S. 1866).

Sec. 14. Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or liabilities, shall subject those guilty thereof to fine or imprisonment, or both, at the discretion of the Court. Any person who has sustained injury from such fraud may also recover Sec. 312, C. S. 1858

damages therefor against those guilty of participating in such fraud.

(This section was embodied in Sec. 9, Ch. 34, Title I, R. S. 1866).

Sec. 313, C. S. 1858

Sec. 15. The diversion of the funds of the corporation to other objects than those mentioned in their articles and the notices published as aforesaid (*provided,* any person be thereby injured) and the payment of dividends which leave insufficient funds to meet the liabilities of the corporation, shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section; and such dividends, or their equivalent in the hands of individual stockholders, shall be subject to said liabilities.

(This section became Sec. 44, Title I, Ch. 34, R. S. 1866).

Sec. 314, C. S. 1858

Sec. 16. Dividends by insurance companies, made in good faith, before their knowledge of the happening of actual losses, are not intended to be punished by the provisions of the preceding section.

Sec. 315, C. S. 1858

Sec. 17. A failure to comply substantially with the foregoing requisitions in relation to organization and publicity, renders the individual property of all the stockholders liable for the corporate debts.

(This was embodied in Sec. 9, Ch. 34, Title I, R. S. 1866).

Sec. 316, C. S. 1858

Sec. 18. Either such failure or the practice of fraud in the manner hereinbefore mentioned shall cause a forfeiture of all the privileges hereby conferred, and the courts may proceed to wind up the

business of the corporation by an information in the manner prescribed by law.

Sec. 19. The intentional keeping of false books or accounts by any corporation, whereby anyone is injured, is a misdemeanor on the part of those concerned therein, whose duty it was to see that the books and accounts were correctly kept. Sec. 317, C. S. 1858

Sec. 20. The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so far as to show the name of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not in any way except the person or persons making such transfer from any liability or liabilities of said corporation which were created prior to such transfer. The books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same. Sec. 318, C. S. 1858

(This became Sec. 8, Ch. 34, Title I, R. S. 1866).

Sec. 21. A corporation organized or attempted to be organized in accordance with the provisions of this chapter, shall cease to exist by the non-user of its franchises for two years at any one time; but such body shall not forfeit its franchises by reason of its omission to elect officers or to hold meetings at any time prescribed by the laws; *Provided,* such Sec. 319, C. S. 1858

act be done within two years of the time appointed therefor.

Sec. 320, C. S. 1858

Sec. 22. Corporations whose charters expire by their own limitation, or by the voluntary act of the stockholders, may nevertheless continue to act for the purpose of winding up their concerns, but for no other purpose.

Sec. 321, C. S. 1858

Sec. 23. Nothing herein contained exempts the stockholders of any corporation from individual liability to the amount of the unpaid installments on the stock owned by them, or transferred by them for the purpose of defrauding creditors; and an execution against the company may to that extent be levied upon such private property of any individual.

(This became part of Sec. 9, Ch. 34, Title I, R. S. 1866).

Sec. 322, C. S. 1858

Sec. 24. In none of the cases contemplated in this chapter can the private property of the stockholders be levied upon for the payment of corporate debts while corporate property can be found with which to satisfy the same; but it will be sufficient proof that no property can be found if an execution has issued on a judgment against the corporation, and a demand thereon made of some one of the last acting officers of the body for property on which to levy, and if he neglects to point out any such property.

(This became Sec. 10, of Ch. 34, Title I, R. S. 1866).

Sec. 323, C. S. 1858

Sec. 25. The defendant in any stage of a cause may point out corporate property subject to levy, and upon his satisfying the Court of the existence

of such property, by affidavit or otherwise, the cause may be continued, or execution against the defendant stayed, until the property can be levied upon and sold; and the Court may subsequently render judgment and order execution for any balance which there may be after disposing of the corporate property according to the stage of the cause; but if a demand of property has been made as contemplated in the preceding section, the costs of such proceedings shall in any event be paid by the company or by the defendant.

(This became Sec. 11, Ch. 34, Title I, R. S. 1866).

Sec. 324, C. S. 1858

Sec. 26. When the private property of a stockholder is taken for a corporate debt, he may maintain an action against the corporation for indemnity, and against any of the other stockholders for contribution.

Sec. 325, C. S. 1858

Sec. 27. For the purpose of repairs, rebuilding or enlarging, or to meet contingencies, or for the purpose of a sinking fund, the corporation may establish a fund which they may loan, and in relation to which they may take the proper securities.

Sec. 326, C. S. 1858

Sec. 28. When the franchise of a corporation has been levied upon under an execution and sold, the corporation shall not have power to dissolve the corporation so as to destroy the franchise, and if they neglect to keep up an organization sufficient to enable the business to proceed, the purchaser thereupon becomes vested with all the powers of the corporation requisite therefor; and when it becomes impracticable for an individual so to conduct them, and in cases where doubts or difficulties,

not herein provided for, arise, the purchaser may apply by petition to the District Court, which is hereby vested with authority to make any orders requisite for carrying into effect the intent of this chapter in this respect.

Sec. 327, C. S. 1858

Sec. 29. In any proceedings by or against a corporation, or against a stockholder, to charge his private property, or the dividends received by him, the Court is invested with power to compel the officers to produce the books of the corporation on the motion of either party, upon a proper cause being shown for that purpose.

Sec. 328, C. S. 1858

Sec. 30. A single individual may entitle himself to all the advantages of this chapter, provided he complies substantially with all its requirements, omitting those which, from the nature of the case are inapplicable.

Sec. 329, C. S. 1858

Sec. 31. Persons acting as a corporation under the provisions of this chapter, will be presumed to be legally incorporated, until the contrary is shown; and no such franchise shall be declared actually null or forfeited, except in a regular proceeding brought for that purpose.

Sec. 330, C. S. 1858

Sec. 32. No body of men acting as a corporation under the provisions of this chapter, shall be permitted to set up the want of a legal organization as a defense to an action against them as a corporation, nor shall any person sued on a contract made with such a corporation, or sued for an injury to its property, or a wrong done to its interests, be permitted to set up a want of such legal organization in his defense.

Sec. 331, C. S. 1858

Sec. 33. Corporations regularly organized under the general law heretofore in force, by adapting their articles of association to the provisions of this chapter, and by making the required publication of the change, as well as of their intention to act under the foregoing provisions, will be entitled to all the advantages and subjected to all the liabilities above provided for, but the change in their articles of association must be made in accordance with those articles, or by the unanimous consent of the stockholders.

Sec. 332, C. S. 1858

Sec. 34. Mutual Insurance Companies, organized under the provisions of this chapter, may render their premium notes a lien upon the whole or any part of the real estate upon which the property insured is situated, whether such real estate is or is not exempt from other liabilities as a homestead; but such lien will not attach until the premium note stating the property on which it is a lien is filed for record and treated in the same manner as though it were a mortgage from the maker thereof to the company, except that it need not be acknowledged.

Sec. 333, C. S. 1858

Sec. 35. Nothing herein contained is intended to affect the interests of companies already organized, further than is above expressed.

Section 1 of Chapter 34, Title I, R. S. 1866 came from Chapter 55, General Laws 1858, Section one. It was modified by inserting the words "not less than five" after the word "persons" in the first line of that section, and by striking out the words "transaction of any lawful business, including the establishment of ferries," and by adding after the words "internal improvement" the words "which require the taking of private property or any easement therein." Nothing is taken from Chapter 70 of the General Laws of 1858, the general railroad act in existence before the Revision of 1866, except possibly the words "not less than five."

Sec. 3, of Chapter 55, General Laws 1858, became Section 2, of Title I, of Chapter 34, Revised Statutes 1866.

Section 12, of Chapter 55, General Laws 1858, became Section 6, of Title I, Chapter 34, Revised Statutes 1866.

Section 13, of Chapter 55, General Laws 1858, became Section 7, of Chapter 34, Title I, Revised Statutes 1866.

Section 15, of Chapter 55, General Laws 1858, became Section 44, of Chapter 34, Title I, Revised Statutes 1866.

Section 20, of Chapter 55, General Laws 1858, became Section 8, of Chapter 34, Title I, Revised Statutes 1866.

Section 14, Section 17, and Section 23, of Chapter 55, General Laws 1858, combined and amended became Section 9, of Chapter 34, Title I, Revised Statutes 1866.

Section 24, of Chapter 55, General Laws 1858, became Section 10, of Chapter 34, Title I, Revised Statutes 1866.

Section 25, of Chapter 55, General Laws 1858, became Section 11, of Chapter 34, Title I, Revised Statutes 1866.

As will be perceived from the title, Chapter 55 of the General Laws of 1858 is a general incorporation act. No provision existed in this act to condemn private property.

Section 9, of Chapter 55, General Laws 1858, provides that corporations for the construction of any work of internal improvement may be formed to endure 50 years.

CHAPTER LXX, GENERAL LAWS OF MINNESOTA, 1858.

An Act to Provide for the Incorporation and Regulation of Railroad Companies.

Be it enacted by the Legislature of the State of Minnesota:

Sec. 243, C. S. 1858

Section 1. That any number of persons NOT LESS THAN FIVE associating for the purpose of constructing a RAILROAD, shall subscribe a statement which shall specify as follows:

First: The name assumed by such company and by which it shall be known.

Second: The name and place of residence of each of the persons forming the association.

Third: The name of the place or places of the termini of said road, and the county or counties through which said road shall pass.

Fourth: The amount of capital necessary to construct said road. Such statement verified by the affidavit of two or more of the persons therein, shall be acknowledged before some one authorized to take the acknowledgment of deeds, and certified by the Clerk of the District Court and filed in the office of the Secretary of State to be by him recorded in a book kept for that purpose, and the original, or copy thereof, duly certified by the Secretary of State, shall be evidence of the existence of such company.

Sec. 244, C. S. 1858

Sec 2. That when such certificate shall have been filed and recorded as aforesaid the persons

named as corporators therein are hereby authorized to carry into effect the objects named in said certificate in accordance with the provisions of this act; and they and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate, with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, and the same to alter at pleasure, and to do all acts necessary to carry into effect the object for which it was created; and such company shall possess all the powers and be subject to all rules, liabilities and restrictions provided by this act. *Provided,* That any corporation or corporations formed and organized or consolidated under or by virtue of this act, exercising or attempting to exercise any banking powers under any pretense whatever, or the business of broker or brokerage, shall forfeit their right of incorporation and consolidation under or by virtue of this act.

Sec. 3. Any corporation formed in pursuance of this Act shall be and is hereby authorized to construct and maintain a railroad, with single or double track, with such side-tracks, turn-outs, offices and depots, as it may deem necessary, between the points named in the certificate, commencing at or within and extending to or into any town, city or

Sec. 245, C. S. 1858

village, along the line of said road, or named as the place of the termini of such road, and construct branches from the main line to other towns or places within the limits of any county through which said road may pass.

Sec. 246, C. S. 1858

Sec. 4. The capital stock of such company shall be divided into shares of fifty dollars each, and consist of such sum as may be named in the certificate; such shares shall be regarded as personal property, and shall be subject to execution at law.

Sec. 247, C. S. 1858

Sec. 5. An installment of five dollars on each share of stock shall be payable at the time of making the subscription, and the residue thereof shall be paid in such installments, and at such times and places, and to such persons, as may be required by the directors of such companies.

Sec. 248, C. S. 1858

Sec. 6. If any installment of stock shall remain unpaid for sixty days after the time it may be required, whether such stock is held by an assignee, transferee, or the original subscriber, the same may be collected by action of debt; or the directors may sell the stock so unpaid at public auction, for the installments then due thereon; first giving thirty days' public notice of the time and place of sale, in some newspaper in general circulation in the county where such delinquent stockholder resided at the time of making such subscription, or becoming such assignee or transferee, or in the county of his actual residence at the time of making such assignment or transfer, or, if such stockholder reside out of the State, such publication shall be made in the county where the principal office of the

company is located, and if any residue of money shall remain after paying the amount due on said stock, the same shall, on demand, be paid over to the owner; if the whole of said installment be not paid by such sale, the remainder shall be recoverable by an action of debt against the subscriber, assignee or transferee.

Sec. 249, C. S. 1858

Sec. 7. That whenever any railroad company, heretofore incorporated, or created and incorporated under the provisions of this Act, shall, in the opinion of the directors thereof, require an increased amount of capital stock, they shall, if authorized by the holders of a majority of the stock, file with the Secretary of State a certificate, setting forth the amount of such desired increase, and thereafter such company shall be entitled to have such increased capital as is fixed by said certificate.

Sec. 250, C. S. 1858

Sec. 8. That the persons named in said certificate of incorporation, or any three of them, shall be authorized to order books to be opened for receiving subscriptions to the capital stock of said company, at such time or times, and at such place or places as they may deem expedient, after having given at least thirty days' notice in a newspaper published or generally circulated in one or more counties where books of subscription are to be opened, of the time and place of opening books; and so soon as ten per centum of the capital stock shall be subscribed, they may give like notice for the stockholders to meet at such time and place as they may designate, for the purpose of choosing seven

directors, who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified; at the time and place appointed, directors shall be chosen by ballot, by such of the stockholders as shall attend for that purpose, either in person or by lawful proxies, each share shall entitle the owner to one vote, and a plurality of votes shall be necessary for a choice; but after the first election of directors, no person shall vote on any share on which any installment is due and unpaid. The persons named in such certificates, or such of them as may be present, shall be inspectors of election, and shall certify what persons are elected directors and appoint the time and place for holding the first meeting. A majority of said directors shall form a board and be competent to fill vacancies in their board, make by-laws and transact all business of the corporation. An annual election shall be held for directors, at such time and place as the stockholders, at their first meeting, shall determine, or as the by-laws of the corporation may require; and the directors chosen at any election, shall, so soon thereafter as may be convenient, choose one of their number President, and shall appoint a Secretary and Treasurer of the corporation. The directors, before entering on their duties, shall each take an oath or affirmation, faithfully to discharge his duties, and they shall, from time to time make such dividends of the profits of said company, as they may think proper.

Sec. 251, C. S. 1858

Sec. 9. Such corporation is authorized to enter upon any land, for the purpose of examining and surveying its railroad line, and may appropriate so much thereof as may be deemed necessary for its railroads, including necessary sidetracks, depots and workshops, and water stations, materials for construction, except timber, a right of way over adjacent lands, sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains; but no appropriation of private property to the use of any corporation provided for in this act, shall be made, until full compensation therefor be first made, in money, or first secured by deposit of money to the owner or owners, irrespective of any benefit from any improvement proposed by such corporation, or in such manner as is or may be prescribed by law.

Sec. 252, C. S. 1858

Sec. 10. That whenever any railroad company heretofore incorporated, or which may hereafter be incorporated, shall find it necessary for the purpose of avoiding annoyance to public travel, or dangerous or difficult curves, or grades, or unsafe or unsubstantial grounds or foundations, or for other reasonable causes, to change the location or grade of any portions of their road, whether heretofore made or hereafter to be made, such railroad companies shall be, and are hereby authorized to make such changes of grade and location, not departing from the general route prescribed in the certificate of such company, and for the purpose of making any such change in the location and grade of any

such road, as aforesaid, such company shall have all the rights, powers and privileges to enter upon and take and appropriate such lands and make surveys necessary to effect such changes and grades, upon the same terms, and be subject to the same obligations, rules and regulations as are or shall be prescribed by law, and shall also be liable, in damages, when any have been caused by such change, to the owner or owners of the lands upon which said road was heretofore constructed, to be ascertained and paid or deposited as aforesaid; but no damages shall be allowed unless claimed within thirty days after actual notice of such intended change shall be given to such owner or owners, if residing on the premises, or notice by publication in some newspapers in general circulation in the county, if non-resident.

Sec. 253, C. S. 1858

Sec. 11. If it shall be necessary in the location of any part of any railroad, to occupy any road, street, alley or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same

manner and upon the same terms as is provided for the appropriation of the property of individuals, by the ninth section of this act.

(This section became Sec. 29, Title I, Ch. 34, R. S. 1866).

Sec. 254, C. S. 1858

Sec. 12. Such corporation may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile, and for the transportation of property, not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said company or prescribed by law.

(This section became Sec. 35, Title I, Ch. 34, R. S. 1866).

Sec. 255, C. S. 1858

Sec. 13. Such company shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, at a rate of interest not exceeding eight per cent per annum, and may execute bonds or promissory notes therefor, in sums of not less than one hundred dollars, and to secure the payment thereof, may pledge the property and income of such company.

Sec. 256, C. S. 1858

Sec. 14. Such company may acquire, by purchase or gift, any lands in the vicinity of said road, or through which the same may pass, so far as may be deemed convenient or necessary by said company to secure the right of way, or such as may be granted to aid in the construction of such roads, and the same to hold or convey in such manner as the di-

rectors may prescribe, and all deeds and conveyances made by such company, shall be signed by the President, under the seal of the corporation, and any existing railroad corporation may accept the provisions of this act, and after such acceptance, all conflicting provisions of their respective charters shall be null and void.

Sec. 257, C. S. 1858

Sec. 15. It shall be lawful for such corporation, whenever it may be necessary, in the construction of such road, to cross any road or stream of water, to divert the same from its present location or bed; but said corporation shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness.

Sec. 258, C. S. 1858

Sec. 16. Such corporation shall, as soon as convenient, after its organization, establish a principal office, at some point on the line of its road, and may change the same at pleasure, giving public notice in some newspaper of such establishment or change.

Sec. 259, C. S. 1858

Sec. 17. Every company organized under this act shall be required to erect, at all points where their road shall cross any public road, at a sufficient elevation from such public road to admit of the free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons of the necessity of looking out for the cars; and any company neglecting or refusing to erect such sign, shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal; and each railroad company shall be required to fence its roads with good, sub-

stantial fence, under such rules as the county supervisors of the several counties through which the same may pass, shall prescribe.

This section became Sec. 33, Title I, Ch. 34, R. S. 1866).

Sec. 260, C. S. 1858

Sec. 18. That each and every railroad company incorporated under this act, shall, annually, in the month of January, make a full report of the condition of its affairs, to the Auditor of the State, showing the amount of the capital stock of such company, the gross amount of tolls or receipts during the previous year, the cost of repairs and incidental expenses, the net amount of profits and the dividends made, with such other facts as may be necessary to a full statement of the affairs and condition of such road; and the Auditor of State shall annually present an abstract copy of such report to the Legislature.

(This section became Sec. 43, Title I, Ch. 34, R. S. 1866).

Sec. 261, C. S. 1858

Sec. 19. That whenever any railroad company now existing, or which may hereafter organize under this Act, shall deem it necessary to extend their line of road across any navigable waters of this State, it shall be lawful, and they are hereby granted full power, to construct such bridge or bridges as may be required for purposes of said road across such navigable waters, and to repair and maintain the same in such manner as may best subserve the interests of such company; *Provided*, That such bridge shall not be constructed in a manner to ob-

struct or impede, in any wise, the free navigation of said waters; *And Provided*, That nothing herein contained shall be construed as violative of the laws of the United States in respect to the navigable waters therein.

(This section became Sec. 32, Title I, Ch. 34, R. S. 1866).

Sec. 262, C. S. 1858

Sec. 20. That every railroad company in this state, shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such company as a station for receiving passengers upon such trains, at least one minute; and shall also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods before each arrival at the crossing of any other railroad; and every company, and every person in the employment of such company, that shall violate, or cause or permit to be violated, the provisions of this section, shall be liable to a forfeiture of not more than one hundred dollars, nor less than twenty dollars, to be recovered in an action of debt, before any justice of the peace of the county in which such violation shall occur, upon the complaint of any person, one-half to go to the complainant and the remainder to the use of the common schools in the county; and such company shall be further liable in the full amount of damages done to property or person in consequence of any neglect on the part of its agents or employes to comply with the requirements of this section; and in all cases in which a forfeiture shall occur

under the provisions of this section, the company, whose agents shall cause or permit such violation, shall be liable for the amount of such forfeiture, and in all cases the conductor upon such train shall be held *prima facie* to have caused the violation of this section, which may occur on the train in his charge.

(This section became Sec. 34, Title I, Ch. 34, R. S. 1866).

Consolidation of Railroad Companies.

Sec. 21. That whenever the lines of railroad of any railroad companies in this State, or any portion of such lines, have been or may be constructed so as to admit the passage of burden or passenger cars over any two or more of such roads continuously without break or interruption, such companies are hereby authorized to consolidate themselves into a single corporation in the manner following: Sec. 263, C. S. 1858

1. Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each for the consolidation of the said two or more corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the names and places of residence and number of the directors thereof, which shall not exceed fifteen; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share, which shall not be less than one hun-

dred dollars; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporations; the manner of compensating stockholders in each of said two or more corporations, who refuse to convert their stock into the stock of such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporations shall possess all the powers, rights and franchises conferred upon such said two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this Act; *Provided,* That all stockholders in either of such corporations who shall refuse to convert their stock into the stock of such new corporation shall be paid at least par value for each of the shares so held by them if they shall so require, previous to said consolidation being consummated.

2. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations, until after it has been submitted to the stockholders of each of the said corporations separately, at a meeting thereof, to be called upon a notice of at least thirty days; specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal office of busi-

ness, and has been sanctioned by such stockholders by the vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot in regard to such agreement, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations.

(This section became Sec. 36, Title I, Ch. 34, R. S. 1866).

Sec. 264, C. S. 1858

Sec. 22. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the first section of this Act, shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned; and the details of such agreement shall be carried into effect, as provided therein.

(This section became Sec. 37, Title I, Ch. 34, R. S. 1866).

Sec. 265, C. S. 1858

Sec. 23. Upon the election of the first board of directors of the corporation created by the agreement in the twenty-first section of this act mentioned, and by the provisions of this Act, all and singular the rights and franchises of each and all

of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said two or more corporations, parties to such agreement, should have continued to retain the title, and transact the business of such corporation; and the titles and the real estate acquired by either of said two or more corporations, shall not be deemed to revert or be impaired by means of anything in this act contained; *Provided*, That all rights of creditors, and all liens upon the property of either of said corporations, parties to said agreement, shall be and hereby are preserved unimpaired; and the respective corporations shall continue to exist so far as may be necessary to enforce the same; *And provided further*, That all the debts, liabilities and duties of either company, shall thenceforth attach to such new corporation, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities and duties, had been originally incurred by it.

(This section became Sec. 38, Title I, Ch. 34, R. S. 1866).

Sec. 24. Any railroad company heretofore or hereafter incorporated may at any time, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing said aid; or any railroad company organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, and if said companies' lines of said road are continuous or connected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; *Provided,* That no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company, represented at such meeting, in person or by proxy, and voting thereat shall have assented thereto. Sec. 266, C. S. 1858

(This section became Sec. 39, Title I, Ch. 34, R. S. 1866).

Sec. 25. This Act shall take effect immediately.

Sec. 267, C. S. 1858

Chapter 70 of the General Laws of Minnesota, 1858, became Sections 243 to 267 of the Compiled Statutes of 1858 (see pages 319 to 324). This chapter was entitled "An Act to provide for the incorporation and regulation of railroad companies." Section 1 provided that "Any number of persons, not less than five, associated for the purpose of constructing a RAILROAD shall subscribe a statement which shall specify as follows:" etc. No part of Section 1 of this Chapter became a part of Chapter 34, of Title I, Statutes of 1866, excepting possibly the words "not less than five," but instead we have the word "RAILWAY" from Section 1, of Chapter 55, of the General Laws of 1858. But Section 11 of said Chapter 70 of the Laws of 1858 became Section 29, of Chapter 34, Title I, Revised Statutes 1866.

Section 19, of Chapter 70, General Laws 1858, became Section 32, of Chapter 34, Title I, Revised Statutes 1866.

Section 17, of Chapter 70, General Laws 1858, became Section 33, of Chapter 34, Title I, Revised Statutes 1866.

Section 20, of Chapter 70, General Laws 1858, became Section 34, of Chapter 34, Title I, Revised Statutes 1866.

Section 12, of Chapter 70, General Laws 1858, became Section 35, of Chapter 34, Title I, Revised Statutes 1866.

Section 21, of Chapter 70, General Laws 1858, became Section 36, of Chapter 34, Title I, Revised Statutes 1866.

Section 22, of Chapter 70, General Laws 1858, became Section 37, of Chapter 34, Title I, Revised Statutes 1866.

Section 23, of Chapter 70, General Laws 1858, became Section 38, of Chapter 34, Title I, Revised Statutes 1866.

Section 24, of Chapter 70, General Laws 1858, became Section 39, of Chapter 34, Title I, Revised Statutes 1866.

Section 18, of Chapter 70, General Laws 1858, became Section 43, of Chapter 34, Title I, Revised Statutes 1866.

CHAPTER XII., GENERAL LAWS OF MINNESOTA, 1860, PAGE 105.

AN ACT FOR THE PROTECTION OF TELEGRAPH COMPANIES.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways in this state on the line of their route, for the purpose of erecting posts or poles on or along the same to sustain the wires or other fixtures; *Provided,* however, That the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads and highways.

(This section became Sec. 28, Title I, Ch. 34, R. S. 1866).

CHAPTER VI., GENERAL LAWS OF 1865, PAGE 16.

AN ACT TO PROVIDE FOR THE INCORPORATION OF CANALS, SLACK-WATER NAVIGATION COMPANIES AND OTHER COMPANIES FOR THE PROSECUTION OF WORKS OF INTERNAL IMPROVEMENT.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Any number of persons may associate themselves and become incorporated, for the construction, improvement and operation of CANALS OR SLACK-WATER NAVIGATION upon any river and lakes in this State, or other improvement of the navigation of any such river or lake, and for the operation and prosecution of any manufacturing business, to which any water power incidentally created, by any such improvement or by the erection of any locks and dams necessary to any such improvement may be applied.

Sec. 2. Any number of persons desirous of forming a corporation for the prosecution of the business specified in section one of this act, shall subscribe a statement, which shall specify as follows:

1st. The name assumed by said corporation.

2d. The general nature of the business to be transacted.

3d. The general powers of said corporation, as specified in section two of an act entitled "An Act for the creation and regulation of corporations," approved August twelfth, eighteen hundred and fifty-eight.

4th. The time of the commencement and the period of the continuance of said corporation.

5th. The amount of the capital stock of said corporation and how to be paid in.

6th. The highest amount of indebtedness or liability to which said company or corporation shall at any one time be subject.

7th. Whether private property to be exempt from corporate debts.

8th. The names and places of residence of the persons forming such association for incorporation.

9th. The names of the first board of directors and in what officers or persons the government of the association and the management of its affairs shall be vested, and when the same shall be elected.

10th. The principal place of business of said association.

11th. The amount of the shares in the capital stock of said association.

Such statement signed by the corporators therein named, shall be filed in the office of the Secretary of State, and be by him recorded in a book kept by him for that purpose, and the original or a copy thereof duly certified by the Secretary of State shall be evidence of the existence of said corporation for all purposes whatsoever.

(This section became Sec. 3, Title I, Ch. 34, R. S. 1866).

Sec. 3. That when such certificate shall have been filed and recorded as aforesaid, the persons

named as corporators therein are hereby authorized to carry into effect the objects named in said certificate in accordance with the provisions of this act and they and their associates, successors and assigns by the name and style provided in said certificate shall thereafter be deemed a body corporate with power to have perpetual succession, to sue and be sued by its corporate name, to have a common seal, which it may alter at pleasure, to render the interests of its stockholders transferable, to exempt the private property of its members from liability for the corporate debts, to establish by-laws and make all rules and regulations deemed expedient for the management of their affairs in accordance with law, and not incompatible with an honest purpose.

(This section became Sec. 4, Title I, Ch. 34, R. S. 1866).

Sec. 4. That any company heretofore incorporated, or attempted to be incorporated under the provisions of an act entitled "An Act to provide for the creation and regulation of corporations," passed August twelfth, 1858, for the prosecution of any business, which can be conveniently prosecuted under the provisions of this act, may conform their certificate to the provisions of this act, and may refile the same with the Secretary of State as herein provided, and thereafter without any other act or ceremony shall become entitled to all the rights, benefits and privileges conferred by this act; and all grants, transfers and conveyances, by the

State or any citizen or corporation to any such company heretofore made, are hereby confirmed unto such company, and shall upon the filing of their certificate under this act be deemed to accrue and enure to the benefit of such company or corporation as thus organized without any other act or ceremony whatever.

(This section became Sec. 12, Title I, Ch. 34, R. S. 1866).

Sec. 5. Any corporation organized under the provisions of this act or any company heretofore organized filing their certificate under the provisions of this act as heretofore provided for, may obtain the right to overflow by reason of any dam, lock, sluices, or other erection necessary for the convenient prosecution of their enterprise, all and any lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property and to canal in and along the valley of any such river, stream, lake or water course, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this act provided.

(This section became Sec. 13, Title I, Ch. 34, R. S. 1866).

Sec. 6. They shall present to the judge of any court of record, in which jury trials are had in any county in which said improvements or any part thereof is or is to be located, or through which any river to be improved or canal is to be constructed runs or is to run, a petition signed by the president and secretary of said company or corporation (setting forth) the description of the enterprise to be prosecuted by them, the termini thereof, the counties through which the same is to run, a general description of the land, property and real estate which it will be necessary to appropriate, take, use or overflow for the purpose of said enterprise, together with the names of the owners of any such property if known.

(This section became Sec. 14, Title I, Ch. 34, R. S. 1866).

Sec. 7. Upon the presentation of such petition the judge shall appoint three disinterested residents of any of the counties named in said petition, commissioners to meet at some point on the line of said improvement on a day specified by said judge, and to inquire touching the matters contained in said petition, and the judge shall fix the fees of said commissioners.

(This section became Sec. 15, Title I, Ch. 34, R. S. 1866).

Sec. 8. Said commissioners shall have power to adjourn from day to day and to such places on the line of such improvement as they shall deem proper.

(This section became Sec. 16, Title I, Ch. 34, R. S. 1866).

Sec. 9. Before entering upon their duties the commissioners shall severally take and subscribe an oath before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment.

(This section became Sec. 17, Title I, Ch. 34, R. S. 1866).

Sec. 10. At least five days' notice of the first meeting of said commissioners shall be given in all cases, and in case of infants such notice shall be served on their guardians or the persons with whom they reside; in case of idiots, lunatics or distracted persons, on their guardians, if they have one, and if not, then on the person in whose care or charge they may be found; in cases of *femmes coverts*, on the husband as well as the *femmes coverts*, but notices to the non-residents of the counties through which said improvements are to be constructed shall be published in some newspaper printed in one of said counties for three weeks in succession, previous to the meeting of said commissioners.

(This section became Sec. 18, Title I, Ch. 34, R. S. 1866).

Sec. 11. The commissioners shall meet at the time and place mentioned in the notice, and shall proceed to examine the entire line of said improvements or so much thereof as is described in said petition and all the lands, property or real estate

which will be damaged, overflowed, taken, appropriated or used by or for the purpose (of) said enterprise, and which is described in said petition, and shall hear the allegations and testimony of all parties interested and shall proceed to make in each case a separate assessment of damages which will result to any person, corporation or company by reason of the construction of said improvement, and shall determine and appraise to the owners of said land, property, easement or any other right, proposed to be taken for said improvement, the amount of damages arising to them respectively from the taking thereof, after making due allowance for any benefit that such owner or owners may respectively derive from the taking such property, land, easement or other right, for the improvement aforesaid. Such amount after making such allowances shall be awarded to such persons respectively as their damages.

(This section became Sec. 19, Title I, Ch. 34, R. S. 1866).

Sec. 12. Within three months after completing their said examination and the making of said appraisement and assessments of damages, the said commissioners shall file the said petition, a copy of their appointment and oath, together with a full report of their doings in the premises, accompanied by a map showing the route and location of the proposed improvement, in the office of the clerk of the court in the county where said application for the appointment of said commissioners had been

made, and shall give the same notice of the filing of their report, as of their meeting.

(This section became Sec. 20, Title I, Ch. 34, R. S. 1866).

Sec. 13. Upon the filing of said report, the petitioners, or any officers of or other persons duly appointed by said corporation may make payment of the damages assessed to parties entitled to the same in manner following:

First: To parties laboring under no disability.

Second: To guardians of infants, husbands or trustees of *femmes coverts.*

Third: To guardians, insane persons, idiots, lunatics and persons under other disability, and receipts for such payments filed in the office of the clerk aforesaid shall estop the parties receipting and their principals, when they shall act in a representative capacity, from all further claims or proceedings in the premises. Payments to parties residing in the State, but not in the county or counties through which said improvement runs, as well as to infants, insane persons and other persons under disability, who have no guardians, and payments to parties residing out of the State, and to persons whose names are unknown, and to persons who shall refuse to receive the payments when tendered, shall be made by depositing the same with the clerk of said court to be paid out under the direction of the judge thereof, and such deposit shall have the same effect as the first mentioned receipts, unless an appeal be taken by the party entitled thereto.

(This section became Sec. 21, Title I, Ch. 34, R. S. 1866).

Sec. 14. Appeals from the assessments made by the commissioners may be taken and prosecuted in the court when the report of said commissioners is filed by any party interested, and a written notice of such appeal shall be served upon the appellee, in the same manner as summons, in ordinary civil actions are served; *Provided*, That such notice shall be served at least twenty days before the hearing of said appeal; and, *Provided further*, That no appeal under this act shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

(This section became Sec. 22, Title I, Ch. 34, R. S. 1866).

Sec. 15. The prosecution of such improvements, shall not be hindered, delayed or prevented by the prosecution of any appeal; *Provided*, the corporation shall execute and file with the clerk of the court in which the appeal is pending, a bond to be approved by said clerk with sufficient surety or sureties conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy.

(This section became Sec. 23, Title I, Ch. 34, R. S. 1866).

Sec. 16. The appellant shall file with the clerk aforesaid, a bond with security (to be approved by

said clerk) in double the amount of the assessment appealed from, payable to the State for the use of all persons interested in the condition of which bond the proceeding appealed from shall be recited with condition for the due and speedy prosecution of said appeal and to abide the judgment that may be rendered therein, and to pay the costs of the appeal, if adjudged so to do by the court in reference to the matter in controversy.

(This section became Sec. 24, Title I, Ch. 34, R. S. 1866).

Sec. 17. Appeals shall bring before the appellate court, the propriety of the amount of damages in respect to the parties to the appeal, and unless the parties otherwise argue (agree) the matter shall be submitted to a jury and tried as other appeal cases are tried, and the court or jury, as the case may be, shall re-assess the damages aforesaid, making the verdict conform to the justice and facts of the case, but the rule for ascertaining and fixing such damages shall be upon the same principles that the commissioners are required to adopt in originally appraising and determining such damages.

(This section became Sec. 25, Title I, Ch. 34, R. S. 1866).

Sec. 18. Upon verdicts rendered by juries, or an assessment by the court, judgment shall be entered declaring that upon payment of the damages assessed by the court or the jury, as the case may be, and costs, if any, the right to construct said im-

provement, to overflow the lands, property and real estate, and do the act in controversy in said appeal, and to take, use and appropriate any property in controversy on said appeal for the purposes of said improvement, shall, as against the parties interested in such verdict be and remain in said company or corporation, their successors and assigns forever, and payments of such judgments may be made as payments of assessments by the commissioners are made, as hereinbefore provided.

(This section became Sec. 26, Title I, Ch. 34, R. S. 1866).

Sec. 19. Any corporation organized under this act may perfect record-evidence of title to the property and estate taken for the purposes of any improvement authorized hereby, by causing the clerk of the court when the report of said commissioners is filed, and after the same has been confirmed, and the award of damages paid, to make certified copies of such report or any part thereof, so far as it shall affect or relate to any real estate or interest therein, situate in any county in this State, through which said improvement runs, and such certified copy to be accompanied by a map showing the location of the land taken, when recorded in the office of the Register of Deeds of the county in which such real estate is situated, shall be effectual to fully pass title to such real estate or the interest therein, taken by said commissioners to said corporation, and such record shall be notice to all parties of the title of said corporation therein, and such record may be read as evidence of such title in all the

courts of this state, except in cases where valid appeals are taken from the report of said commissioners, and in such cases the judgment of the court upon such appeal, after the damages are paid may be recorded in the office of the Register of Deeds of the county where the said real estate or interest therein, and affected by said judgment, is situated, and such record shall be notice and evidence of title in like manner and effect as the record of certified copies found in said report.

(This section became Sec. 27, Title I, Ch. 34, R. S. 1866).

Sec. 20. For the purpose of making preliminary surveys and examinations over and upon any contemplated route, it shall be lawful for any such company, its agents, servants or employes, to enter upon land, doing no unnecessary damage.

(This section became Sec. 30, Title I, Ch. 34, R. S. 1866).

Sec. 21. Any company or corporation organized under this act is authorized to obtain by purchase, gift or contract all the rights of way, tow-paths, flowage and property hereinbefore provided for, and to hold all property, real and personal, necessary and convenient for the successful prosecution of the enterprise.

(This section became Sec. 31, Title I, Ch. 34, R. S. 1866).

Sec. 22. Such company or corporation shall have the power to borrow money on the credit of the corporation, and may execute bonds or promis-

sory notes therefor and to secure the payment thereof, may pledge the property and income of said company; *Provided,* That the amount of the indebtedness or liability of such company shall not at any one time exceed two-thirds of the amount of its capital stock nor the amount to be specified in the certificate hereinbefore provided for.

(This section became Sec. 40, Title I, Ch. 34, R. S. 1866).

Sec. 23. The corporators named in the certificate hereinbefore provided for, are authorized, at their first annual meeting or at such other time or times as they may deem best before such annual meeting to be designated by them, to open books for subscription to the capital stock of said company or corporation under such regulations as they shall prescribe, and when after the opening of books for the subscription of stock, sufficient stock shall be subscribed to justify the incorporators or directors to commence such improvement (and the first installments upon such stocks are paid in, said company or corporation may commence such improvement) and they shall thereby become invested with all the rights, privileges and franchises conferred by this act.

(This section became Sec. 41, Title I, Ch. 34, R. S. 1866).

Sec. 24. When any company or corporation authorized by this act shall have commenced in good faith any improvement therein contemplated, and shall prosecute the same in like good faith, no other

corporation shall be permitted to interfere with the company or corporation first authorized hereunder.

Sec. 25. Whenever any company created and incorporated under the provisions of this act or adopting its provisions as hereinbefore provided, by re-filing its certificate and conforming the same to the provisions of this act, shall, in the opinion of the directors thereof, require an increased amount of capital stock, or other modification of their articles of association, not inconsistent with the provisions of this act, they shall, if authorized by the holders of a majority of the stock, file in the office of the Secretary of State, a new certificate setting forth the modifications of their said articles of association proposed, and the amount of such desired increase of stock, if any, which said new certificate shall be duly recorded and a reference made to the same, on the margin of the record of the original certificate, and thereafter such company or corporation shall be entitled to have such increased capital as is fixed by said new certificate or such other modification of the original articles of association as shall be therein specified.

(This section became Sec. 42, Title I, Ch. 34, R. S. 1866).

Sec. 26. This act shall take effect and be in force from and after its passage.

Chapter 6 of the General Laws of 1865 was "An Act to provide for the incorporation of canals, slack-water navigation companies and other companies for the prosecution of works of internal improvement."

Section 2, of said Chapter 6, General Laws 1865, became Section 3, of Chapter 34, Title I, Revised Statutes 1866.

Section 3, of Chapter 6, General Laws 1865, became Section 4, of Chapter 34, Title I, Revised Statutes 1866.

Section 4, of Chapter 6, General Laws 1865, became Section 12, of Chapter 34, Title I, Revised Statutes 1866.

Section 5, of Chapter 6, General Laws 1865, became Section 13, of Chapter 34, Title 1, Revised Statutes 1866.

Sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, of Chapter 6, General Laws 1865, became Sections 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 40, 41, 42 of Chapter 34, Title I, Revised Statutes 1866.

In these three statutes, one an act providing for the incorporation of corporations generaliy, the other providing for the incorporation of railroads only, and the third an act providing for the incorporation of canals, slack-water navigation companies and other companies for the prosecution of works of internal improvement are found the sources of Title I, Chapter 34, R. S. 1866.

CHAPTER XXIV., GENERAL LAWS OF 1860, PAGE 172.

AN ACT TO AUTHORIZE THE FORMATION OF CORPORATIONS FOR MINING, SMELTING, OR MANUFACTURING IRON, COPPER, SILVER, OR OTHER ORES OR MINERALS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. All corporations organized under the provisions of this act, shall be capable of suing and being sued in any court in this state, and may have a common seal, and alter the same at pleasure, may elect or appoint in such manner as they shall determine, all necessary officers and agents and may fix their compensation and determine their duties, and make from time to time such by-laws not inconsistent with the constitution and laws of this state, as a majority of the stockholders shall direct.

Sec. 2. Any number of persons not LESS THAN THREE, who shall, by articles of agreement in writing, associate according to the provisions of this act, under any name assumed by them for the purpose of engaging in and carrying on mining, smelting or manufacturing iron, copper, silver, or other minerals, and who shall comply with the provisions of this act, shall with their successors and assigns constitute a body politic and corporate in fact and name, under the name assumed by them in their articles of association; *Provided*, no com-

pany shall take a name previously assumed by any other company.

(This section became Sec. 45, Title II, Ch. 34, R. S. 1866).

Sec. 3. Before any company formed under this act shall commence business, the president and directors shall cause their articles of association to be filed with the Secretary of State of this State, and also a copy thereof with the Register of Deeds of the county in which its principal business is to be conducted; where said articles shall be recorded at length in books prepared for that purpose.

Sec. 4. The articles of every such association shall be signed by the persons associating in the first instance, and acknowledged before some person authorized by law to take the acknowledgment of deeds, and shall state:

First: The distinct purpose for which the association is formed.

Second: The amount of their capital stock and the number of shares.

Third: The amount of capital stock actually paid in.

Fourth: The names of the stockholders, their respective residences, and the number of shares held by each person.

Fifth: The place in the State where their office for the transaction of business is to be held, and the county or counties in which their business is to be carried on.

Sixth: The term of its existence, NOT TO EXCEED THIRTY YEARS.

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Sec. 5. The amount of capital stock in every such corporation shall, in no case be, less than ten thousand (10,000) dollars nor more than five hundred thousand (500,000) dollars and shall be divided into shares of fifty dollars each; but the capital stock and number of shares may be increased at any regular meeting of the stockholders; *Provided,* the amount of capital when so increased, shall not exceed the sum of five hundred thousand (500,000) dollars.

(This section became Sec. 47, Title 2, Ch. 34, Rev. Stat. of 1866).

Sec. 6. The purposes for which such corporation shall be established, shall be distinctly and definitely specified in the articles of association; and it shall not be lawful for said corporation to appropriate its funds to any other purpose.

Sec. 7. Any two of the signers of such articles of association may call the first meeting of the corporators for the purpose of organizing the company, at such time and place as they may appoint, by giving personal notice to each corporator, or by publishing the same in some newspaper at least fifteen days before the time appointed for such meeting.

Sec. 8. The stock, property and business of such corporation shall be managed by not less than three nor more than seven directors, as the articles may determine—one of whom shall be a resident of the state; they shall hold their offices for one year, and until their successors shall be duly chosen. The time and place of the meeting of stockholders for

the election of directors and other purposes shall be fixed by the by-laws, and at all such meetings each share of stock shall be entitled to one vote.

Sec. 9. The directors of every such corporation shall choose one of their number president, and shall appoint such other officers and agents as the articles of association or by-laws may require, who shall hold their offices for one year, or until a majority of the stockholders choose others in their stead. The majority of directors for the time being, shall have power to fill any vacancy which may happen in their board by death, resignation, or otherwise, until the next regular meeting of the stockholders.

Sec. 10. The directors may call in the subscription to the capital stock of such corporation by installments in such portion and at such times and places as they shall think proper, by giving notice thereof as the by-laws shall prescribe, and in case any stockholder shall neglect or refuse payment of any such installment for the space of sixty days after the same shall have become due and payable, and after he shall have been notified thereof, the stock of said delinquent stockholder may be sold by the directors at public auction at the office of the secretary of such corporation, giving at least thirty days' notice in some newspaper in the county in which said office is located; *Provided*, That if said stockholder is a resident of the State, the stock shall be sold at the business office of said corporation in the county in which its business is conducted, giving at least thirty days' notice thereof in

some newspaper printed in the county, and if no newspaper is published in said county then it shall be published in some newspaper at the capital of the State, and the proceeds of such sale shall be first applied in payment of the installlment called for, and the expense of the sale, and the residue shall be refunded to the person entitled to the same; and such sale shall entitle the purchaser to all the rights of a stockholder to the extent of the shares so bought.

Sec. 11. A majority of the directors of any such corporation for the time being, convened according to the by-laws, shall constitute a quorum for the transaction of business; and those holding a majority of the stock at any meeting of the stockholders shall be capable of transacting the business of the meeting. And at all such meetings stockholders may vote in person or by proxy duly filed.

Sec. 12. If it shall so happen that an election of directors shall not take place at the annual meeting, such corporation shall not in consequence thereof be dissolved; but an election may be held at any time thereafter by giving thirty days' notice thereof, in the manner provided in the by-laws of the company.

Sec. 13. Every such corporation shall have power to acquire, hold, and transfer all such real and personal estate as the directors shall adjudge necessary or convenient for the purpose of conducting, carrying on, or disposing of the business of such corporation; *Provided,* that its real estate held at any one time shall not exceed three thousand acres.

(This section became Sec. 48, Title II, Ch. 34, Rev. Stat. of 1866).

Sec. 14. The stock of any such corporation shall be deemed personal property, and shall be transferable only on the books of such company in such form as the directors shall prescribe, and such corporation shall at all times have a lien upon the stock or property of its members invested therein for all the debts due from them to such corporation, which may be enforced by advertisement, and sale in the manner provided for selling delinquent stock; *Provided,* that assessors, and all other officers, whose duty it may be to assess property for purposes of taxation, may take into consideration the productiveness or unproductiveness of the mine, stock, and improvements thereto belonging, and value the same accordingly.

(This section became Sec. 49, Title 2, Ch. 34, Rev. Stat. of 1866).

Sec. 15. The directors shall cause a record to be kept of all stock subscribed and transferred and of all business transactions, and their books and records shall at all times be open to the inspection of any and every stockholder; they shall also when required present to the stockholders reports in writing of the situation and amount of business of the company, and declare and make such dividends of the profits, from the business of the company, not reducing the capital stock while they have outstanding liabilities.

(This section became Sec. 50, Title 2, Ch. 34, Rev. Stat. of 1866).

Sec. 16. The directors of any company organized under this act, shall have power to establish one or more offices without this state, and transact business thereat; *Provided,* however, that an office shall always be maintained in this state where legal process may be served on the person in charge thereof.

(This section became Sec. 51, Title 2, Ch. 34, Rev. Stat. of 1866).

Sec. 17. Each stockholder in any company organized under this act, shall be liable for the debts of the company to the amount of stock held or owned by him therein.

Sec. 18. This act shall take effect from and after its passage.

Title II, of Chapter 34, Revised Statutes 1866, is taken almost bodily from Chapter 24 of the General Laws of 1860, being "An Act to authorize the formation of corporations for mining, smelting or manufacturing iron, copper, silver or other ores or minerals," except the last section (53) of Title II which came from Section 25, of Chapter 55, General Laws 1858, relating to corporations.

COMMISSIONERS' REPORT WHICH WAS ADOPTER AND BECAME R. S. OF 1866.

CHAPTER XXXIV.

CORPORATIONS.

TITLE I.

OF CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

C. S., p. 330 Sec. 299 Amended.

Section 1. Any number of persons NOT LESS THAN FIVE, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slack-water navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

C. S., p. 330 Sec. 301 Amended.

Sec. 2. They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be, and also in the office of the secretary of state, in books kept for such purposes.

1865, p. 18 Sec. 2 Amended.

Sec. 3. Said articles shall contain:

First: The name of the corporation, the general nature of its business and the principal place, if any, of transacting the same.

Second: The time of commencement and the period of continuance of said corparation.

Third: The amount of capital stock of said corporation and how to be paid in.

Fourth: The highest amount of indebtedness or liability to which said corporation shall at any one time be subject.

Fifth: The names and places of residence of the persons forming such association for incorporation.

Sixth: The names of the first board of directors and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same are elected.

Seventh: The number and amount of the shares in the capital stock of said corporation.

And shall be published for four successive weeks in some newspaper printed and published at the capital of the state.

1865, p. 18 Sec. 3 Amended.

Sec. 4. When articles are filed, recorded and published as aforesaid, the persons named as corporators therein, become a body corporate and are authorized to proceed to carry into effect the objects set forth in said articles in accordance with the provisions of this title, and shall have perpetual succession, sue and be sued by its corporate name, have a common seal, which it may alter at pleasure, may render the interests of its stockholders transferable, establish by-laws and make all rules and regulations deemed expedient for the management of its affairs in accordance with law, and not incompatible with an honest purpose.

Sec. 5. No such corporation shall be formed to continue more than FIFTY YEARS IN THE FIRST INSTANCE, but it may be renewed from time to time for periods not longer than fifty years, *Provided*, that three-fourths of the votes cast at

any regular election for the purpose, are in favor of such renewal, and those desiring a renewal, purchase the stock of those opposed thereto at its current value.

Sec. 6. A copy of the by-laws of the corporation with the names of all its officers appended thereto shall be posted in the principal place of business and be subject to public inspection. C. S., p. 331 Sec. 310.

Sec. 7. A statement of the amount of the capital stock subscribed, the amount of capital actually paid in, and the amount of the indebtedness of the company in a general way, shall also be kept posted up in like manner, which statement shall be corrected as often as any material change takes place in relation to any part of the subject matter of such statement. C. S., p. 331 Sec. 311.

Sec. 8. The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so far as to show the name of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person making such transfer, from any liabilities of said corporation which were created prior to such transfer. The books of the company shall be so kept as to show intelligibly, the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are con- C. S., p. 332 Sec. 318.

cerned, shall be subject to the inspection of any persons desiring the same.

C. S., p. 331, Sec. 312, p. 332, s. 315, p. 332, s. 321 combined and amended.

Sec. 9. The private property of each stockholder in any corporation formed as herein provided, is liable for corporate debts in the following cases:

First: For all unpaid installments on stock owned by him or transferred for the purpose of defrauding creditors.

Second: For a failure by the corporation to comply substantially with the provisions aforesaid as to organization and publicity.

Third: When he personally violates any of the provisions of this title in the transaction of any business of the corporation, as officer, director or member thereof, or is guilty of any fraud, unfaithfulness or dishonesty in the discharge of any official duty.

Fourth: To the amount of the stock held or owned by him in all cases.

C. S., p. 332, Sec. 322. Amended.

Sec. 10. The private property of no stockholder shall be levied on under the preceding section, unless such stockholder, as well as the corporation, is duly served with process in the action, and the issue involving his individual liability as aforesaid raised and determined; and in no case whatever shall such property be levied on while sufficient corporate property can be found to satisfy the execution or any part thereof.

C. S., p. 333, Sec. 323 Amended.

Sec. 11. The officer holding an execution, which may be levied on private property, as aforesaid, shall make demand of payment thereon of the president, secretary, or some officer of the corporation,

acting, or who was one of the last acting officers thereof, and if he does not forthwith pay such execution or point out corporate property that may be levied on, the officer shall indorse the fact of such demand, refusal or neglect upon said execution, and thereupon may levy the same upon the private property of the stockholder served and impleaded as aforesaid. Such levy may be made to satisfy any balance due upon the execution after levy upon corporate property, or part payment out of corporate funds.

1865, p. 19, Sec. 4 Amended.

Sec. 12. Any corporation of the class specified in section one of this title, heretofore organized or attempted to be organized under former general laws may conform their articles to the provisions of this title, and refile the same with the secretary of state, as herein provided, and thereafter without any other act or ceremony shall become entitled to all the rights, benefits and privileges conferred herein; and all grants, transfers and conveyances, by the state or any citizen or corporation to any such corporation heretofore made, are hereby confirmed unto such corporation, and shall upon the filing of their articles under this title, be deemed to accrue and enure to the benefit of such corporation as thus organized without any other act or ceremony whatever.

1865, p. 19, Sec. 5 Amended.

Sec. 13. Any corporation organized or re-organized under the provisions of this title, may obtain the right of way, over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites and grounds for depots,

shops and other buildings requisite for the proper carrying on of the business to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices or other erection necessary for the convenient prosecution of their enterprise, all and any lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property, and to canal in and along the valley of any such river, stream, lake or watercourse, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this title provided.

1865, p. 20, Sec. 6 Amended.

Sec. 14. They shall present to the judge of the district court in any county in which said improvements or any part thereof is or is to be located, or through which said railroad or telegraph line runs, or through which any river to be improved or canal to be constructed runs or is to run, a petition signed by the president and secretary of said company or corporation, setting forth a description of the enterprise to be prosecuted by them, the termini thereof, the counties through which the same is to run, a general description of the land, property and real estate which it will be necessary to appropriate, take, use or overflow for the purpose of said enter-

prise, together with the names of the owners of any such property if known.

Sec. 15. Upon the presentation of such petition the judge shall appoint three disinterested residents of any of the counties named in said petition, commissioners to meet at some point on the line of said improvement on a day specified by said judge, and to inquire touching the matters contained in said petition, and the judge shall fix the fees of said commissioners. 1865, p. 20, Sec. 7.

Sec. 16. Said commissioners shall have power to adjourn from day to day and to such places on the line of such improvement as they deem proper. 1865, p. 20, Sec. 8.

Sec. 17. Before entering upon their duties they shall severally take and subscribe an oath before some person qualified to administer oaths, faithfully and impartially to discharge the duties of their appointment. 1865, p. 20, Sec. 9.

Sec. 18. At least five days notice of the first meeting of said commissioners shall be given in all cases, and in case of infants such notice shall be served on their guardians or the persons with whom they reside; in case of idiots, lunatics or distracted persons, on their guardians, if they have any, and if not, then on the person in whose care or charge they are found; in cases of *femmes covert*, on the husband as well as on the *femme covert*, but notices to non-residents of the counties through which said improvements are to be constructed, shall be published in some newspaper printed in one of said counties for three weeks in succession, previous to the meeting of said commissioners. 1865, p. 20, Sec. 10.

1865, p. 21, Sec. 11 Amended.

Sec. 19. The commissioners shall meet at the time and place mentioned in the notice, and proceed to examine the entire line of said canal, telegraph line, railroad or improvements or so much thereof as is described in said petition and all the lands, property or real estate which will be damaged, overflowed, taken, appropriated or used by or for the purpose of said enterprise, and which is described in said petition, and shall hear the allegations and testimony of all parties interested, and proceed to make in each case a separate assessment of damages which will result to any person, corporation or company, by reason of the construction of said canal, telegraph line, railroad or improvement, and shall determine and appraise to the owners of said land, property, easement or any other right proposed to be taken the amount of damages arising to them respectively from the taking thereof, after making due allowance for any benefit that such owners may respectively derive from the canal, telegraph line, railroad or improvement aforesaid.

1865, p. 21, Sec. 12 Amended.

Sec. 20. Within three months after completing their said examination, and the making of said appraisement and assessment of damages, the said commissioners shall file the said petition, a copy of their appointment and oath, together with a full report of their doings in the premises, accompanied by a map showing the route and location of the proposed canal, telegraph line, railroad or improvement in the office of the clerk of the court in the county where said application for the appointment of said commissioners was made, and shall give the

same notice of the filing of their report, as of their meeting.

Sec. 21. Upon the filing of said report the petitioners, or any officers of or other persons duly appointed by said corporation may make payment of the damages assessed to parties entitled to the same in manner following: 1865, p. 21, Sec. 13.

First: To parties laboring under no disability.

Second: To guardians of infants, husbands or trustees of *femmes covert*.

Third: To guardians, insane persons, idiots, lunatics and persons under other disability, and receipts for such payments filed in the office of the clerk aforesaid shall estop the parties giving them and their principals, when they act in a representative capacity, from all further claims or proceedings in the premises. Payments to parties residing in the state, but not in the county or counties through which said canal, line, road or improvement runs, as well as to infants, insane persons and other persons under disability, who have no guardians, and payments to parties residing out of the state, and to persons whose names are unknown, and to persons who refuse to receive the payments when tendered shall be made by depositing the same with the clerk of said court to be paid out under the direction of the judge thereof, and such deposit shall have the same effect as the first mentioned receipts, unless an appeal is taken by the party entitled thereto.

Sec. 22. Appeals from the assessments made by the commissioners may be taken and prosecuted in 1865, p. 22, Sec. 14.

the court where the report of said commissioners is filed by any party interested, and a written notice of such appeal shall be served upon the appellee, in the same manner as a summons in a civil action is served; *Provided,* That such notice shall be served at least twenty days before the hearing of said appeal; *And provided further,* That no appeal under this title shall be taken after the expiration of thirty days from the time of the notification of the filing of the report aforesaid.

1865, p. 22, Sec. 15 Amended.

Sec. 23. The construction of such road, line, canal, or the prosecution of such improvement, shall not be hindered, delayed or prevented by the prosecution of any appeal; *Provided,* the corporation execute and file with the clerk of the court in which the appeal is pending, a bond to be approved by said clerk with sufficient sureties conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy.

1865, p. 23, Sec. 16.

Sec. 24. The appellant shall file with the clerk aforesaid, a bond with sureties (to be approved by said clerk) in double the amount of the assessment appealed from, payable to the state for the use of all persons interested in the condition thereof, in which bond the proceeding appealed from shall be recited with condition for the due and speedy prosecution of said appeal, and to abide the judgment that may be rendered therein, and pay the costs of the appeal, if adjudged so to do by the court in reference to the matter in controversy.

Sec. 25. Appeals shall bring before the appellate court, the propriety of the amount of damages in respect to the parties to the appeal, and unless the parties otherwise agree, the matter shall be submitted to a jury and tried as other appeal cases are tried, and the court or jury as the case may be, shall re-assess the damages aforesaid, making the verdict conform to the justice and facts of the case, but the rule for ascertaining and fixing such damages, shall be based upon the same principles that the commissioners are required to adopt in originally appraising and determining such damages. 1865, p. 23, Sec. 17.

Sec. 26. Upon verdict or assessment, judgment shall be entered declaring that upon payment of the verdict or assessment, and costs, if any, the right to construct said canal line, railroad, or improvement, to overflow the lands, property and real estate, and do the act in controversy in said appeal, and to take, use and appropriate any property in controversy on said appeal for the purposes aforesaid, shall, as against the parties interested, in such verdict or assessment, be and remain in said corporation, their successors and assigns forever, and payments of such judgments may be made as payments of assessments by the commissioners are made, as hereinbefore provided. 1865, p. 23, Sec. 18. Amended.

Sec. 27. Any corporation organized under this title may perfect record-evidence of title to the property and estate taken for the purposes of any canal, line, railroad, or improvement authorized hereby, by causing the clerk of the court when the report of said commissioners is filed and confirmed, 1865, p. 23, Sec. 19 Amended.

and the award of damages is paid, to make certified copies of such report or any part thereof, so far as it affects or relates to any real estate or interest therein, situate in any county through which said improvement runs, and such certified copy accompanied by a map showing the location of the land taken, when recorded in the office of the register of deeds of the county in which such real estate is situated, shall be effectual to fully pass title to such real estate or the interest therein, taken by said commissioners to said corporation, and such record shall be notice to all parties of the title of said corporation therein, and such record may be read as evidence of such title in all the courts of this state, except in cases where valid appeals are taken from the report of said commissioners, and in such cases the judgment of the court upon such appeal, after the damages are paid may be recorded in the office of register of deeds of the county where the said real estate or interest therein, and affected by said judgment, is situated, and such record shall be notice and evidence of title in like manner and effect as the record of certified copies found in said report.

1860 p. 106, Sec. 1.

Sec. 28. Any telegraph corporation organized under this title has power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures; *provided*, that the same shall be so located as in no way to interfere with the safety

or convenience of ordinary travel on or over the said roads and highways.

C. S., p. 321, Sec. 253 Amended.

Sec. 29. If it becomes necessary in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals.

1865, p. 24, Sec. 20.

Sec. 30. For the purpose of making preliminary surveys and examinations over and upon any contemplated route, such corporation, its agents, servants or employes, may enter upon land, doing no unnecessary damage.

1865, p. 24, Sec. 21.

Sec. 31. Any corporation organized under this title is authorized to obtain by purchase, gift or contract, all the rights of way, tow-paths, flowage and property hereinbefore provided for, and hold all property real and personal, necessary and convenient for the successful prosecution of the enterprise.

C. S., p. 322, Sec. 261 Amended.

Sec. 32. Whenever any railroad corporation, whether incorporated under this title or by a special charter, deems it necessary to extend its line of road across any navigable waters of this state, it has power to construct such bridges as may be re-

quired for the purposes of said road across such navigable waters, and to repair and maintain the same in such manner as may best subserve the interests of such corporations; *provided,* that such bridge shall not be constructed in a manner to obstruct or impede, in any wise, the free navigation of said waters.

C. S., p. 322, Sec. 259.

Sec. 33. Every corporation organized under this title shall erect, at all points where their road crosses any public road, at a sufficient elevation from such public road to admit of a free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons of the necessity of looking out for the cars; and any company, neglecting or refusing to erect such signs, shall be liable in damages for all injuries occurring to persons or property from such neglect or refusal; and each railroad company shall fence its roads with a good substantial fence, under such rules as the county commissioners of the several counties through which the same may run prescribe.

C. S., p. 322, Sec. 262.

Sec. 34. Every railroad corporation organized under this title, shall cause all its trains of cars for passengers to stop upon each arrival at a station advertised by such corporation as a station for receiving passengers upon such trains, at least one minute; and also cause all its trains of cars to entirely stop not more than sixty rods and not less than ten rods before each arrival at the crossing of any other railroad; and every corporation, and every person in the employment of such corporation

that violates, or causes, or permits to be violated, the provisions of this section, is liable to a forfeiture of not more than one hundred dollars nor less than twenty dollars, to be recovered in a civil action before any justice of the peace of the county in which such violation occurs, upon the complaint of any person, one-half to go to the complainant and the remainder to the use of common schools in the county; and such company is further liable in the full amount of damages done to property or person in consequence of any neglect on the part of its agents or employes to comply with the requirements of this section; and in all cases in which a forfeiture occurs under the provisions of this section, the company, whose agents cause or permit such violation, shall be liable for the amount of such forfeiture, and in all cases the conductor upon such train shall be held *prima facie* to have caused the violation which may occur upon the train in his charge.

C. S., p. 321, Sec. 254.

Sec. 35. Such corporation may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile, and for the transportation of property, not exceeding five cents per ton per mile, when the same is transported a distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by said corporation or prescribed by law.

C. S., p. 323, Sec. 263 Amended.

Sec. 36. Whenever the lines of railroad of any railroad corporation whether organized under this

title or by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads continuously without break or interruption, such corporations may consolidate themselves into a single corporation in the manner following:

First: Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the names and places of residence and number of the directors thereof; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share, which shall not be less than one hundred dollars; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; the manner of compensating stockholders in each of the old corporations, who refuse to convert their stock into the stock of the new corporation; with such other details as they deem necessary to perfect the consolidation of said corporations; and such new corporation shall possess all the powers, rights and franchises conferred upon said corporations, and be subject to all the restrictions, and perform all the duties imposed by the provisions of this title, *Provided*, that all stockholders in either of such corporations who refuse to convert their stock into

the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they so require, previous to the consummation of said consolidation.

Second: Such agreement of the directors shall not be deemed to be the agreement of the said old corporations, until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof, to be called upon a notice of at least thirty days; specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office, and published for at least three successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal office of business; and is sanctioned by such stockholders by the vote of at least two-thirds in amount of the stockholders present at such meeting, voting by ballot, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately, it shall be deemed to be the agreement of the said old corporations.

C. S., p. 324, Sec. 264

Sec. 37. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, the said old corporations shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned; and the de-

tails of such agreement shall be carried into effect, as provided therein.

C. S., p. 324, Sec. 265

Sec. 38. Upon the election of the first board of directors of the corporation created by said agreement, the rights and franchises of each of said old corporations, their rights and interests in and to every species of property, real, personal and mixed, and things in action shall be deemed to be transferred to and vested in such new corporation without any other deed or transfer, and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner and to the same extent, as if the said old corporations had continued to retain the title, and transact the business of such corporation; and the titles and real estate acquired by either of said old corporations, shall not be deemed to revert or be impaired by means of anything in this title contained; *Provided*, That all rights of creditors, and all liens upon the property of either of said old corporations shall be preserved unimpaired; and all the debts, liabilities and duties of either company, shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner as if such debts, liabilities and duties, had been originally incurred by it.

C. S., p. 324, Sec. 266 Amended.

Sec. 39. Any railroad corporation heretofore or hereafter incorporated, whether under the provisions of this title or by special charter, may at any time, and by means of subscription to the capital of any other corporation, or otherwise, aid such cor-

poration in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the corporation furnishing said aid or any railroad corporation, may lease or purchase any part or all of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, upon such terms and conditions as may be agreed on; or any two or more railroad corporations whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; *Provided,* That no such aid shall be furnished, nor any purchase, lease, or arrangement perfected, until a meeting of the stockholders of each of said corporations has been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the stockholders of at least two-thirds of the stock of such corporation represented at such meeting, in person or by proxy, and voting thereat assent thereto.

Sec. 40. Such corporation has the power to borrow money on the credit of the corporation, and may execute bonds or promissory notes therefor and to secure the payment thereof, may pledge the property and income of said company; *Provided,* That the amount of the indebtedness or liability of such company shall not at any one time exceed two-thirds of the amount of its capital stock nor the amount to be specified in the certificate hereinbefore provided for.

1865, p. 24, Sec. 22.

1865, p. 24, Sec. 23 Amended.

Sec. 41. The corporators named in the articles hereinbefore provided for, are authorized at their first annual meeting, or at such other time as they deem best before such annual meeting to be designated by them, to open books for the subscription to the capital stock of said corporation under such regulations as they shall prescribe, and when after the opening of books for the subscription of stock, sufficient stock is subscribed to justify the incorporators or directors to commence such canal, line, railroad or improvement, and the first installments upon such stock are paid in, said corporation may commence work thereon, and they shall thereby become invested with all the rights, privileges and franchises conferred by this title.

1865, p. 25, Sec. 25.

Sec. 42. Whenever any corporation created and incorporated under the provisions of this title, or adopting its provisions as hereinbefore provided, shall, in the opinion of the directors thereof, require an increased amount of capital stock, or other modification of their articles of association, not inconsistent with the provisions of this title, they shall, if authorized by the holders of a majority of the stock, file in the office of the secretary of state, new articles setting forth the modifications of their said articles of association proposed, and the amount of such desired increase of stock, if any, which said new articles shall be duly recorded and a reference made to the same on the margin of the record of the original certificate or articles, and thereafter such corporation shall be entitled to have such increased capital as is fixed by said new arti-

cles, or such other modification of the original articles of association as shall be therein specified.

C. S., p. 322, Sec. 260.

Sec. 43. Every railroad company incorporated under this title, shall annually, in the month of January, make a full report of the condition of its affairs, to the auditor of state, showing the amount of the capital stock in such company, the gross amount of tolls or receipts during the previous year, the costs of repairs and incidental expenses, the net amount of profits and the dividends made, with such other facts as may be necessary to a full statement of the affairs and conditions of such road; and the auditor of state shall annually present an abstract copy of such report to the legislature.

C. S., p. 331, Sec. 313 Amended.

Sec. 44. The diversion of the corporate property to other objects than those specified in the articles and notices published as aforesaid (if any person is injured thereby), the declaring of dividends, when the profits are insufficient to pay the same, the payment of dividends when the funds remaining will not meet the liabilities of the corporation, any wilful failure to comply with the articles of incorporation, or any intentional deception of the public or individuals in relation to their means or liabilities, are criminal offenses, and persons guilty of any of them may be indicted, and on conviction shall be punished by a fine of not more than five thousand dollars, or by imprisonment in the state prison not more than three years, or both such fine and imprisonment, in the discretion of the court.

TITLE II, COMMISSIONERS REPORT, 1866, PAGE 312.

OF CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE I.

1860, p. 173, Sec. 2 Amended.

Sec. 45. Any number of persons NOT LESS THAN THREE, who shall, by articles of agreement in writing, associate according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting, or manufacturing iron, copper, or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical or chemical business, and who shall comply with the provisions of this title, shall, with their successors and assigns constitute a body politic and corporate, under the name assumed by them in their articles of association; *Provided,* No company shall take a name previously assumed by any other company.

New.

Sec. 46. The provisions of sections two, three, four, six, seven, eight, nine, ten, eleven and forty-four of title one, shall apply to and be observed by corporations organizing under this title.

1860, p. 174, Sec. 5.

Sec. 47. The amount of capital stock in every such corporation shall, in no case be less than ten thousand dollars nor more than five hundred thousand dollars, and shall be divided into shares of fifty dollars each; but the capital stock and number of shares may be increased at any regular meeting of the stockholders; *Provided,* The amount of capital

when so increased, shall not exceed the sum of five hundred thousand dollars.

Sec. 48. Every such corporation has power to acquire, hold, and transfer all such real and personal estate as is necessary or convenient for the purpose of conducting, carrying on, or disposing of the business of such corporation. 1860, p. 175, Sec. 13 Amended.

Sec. 49. The stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation, in such form as the directors prescribe, and such corporation shall at all times have a lien upon the stock or property of its members invested therein for all the debts due from them to such corporation, which may be enforced by advertisement and sale in the manner provided for selling delinquent stock. 1860, p. 175, Sec. 14.

Sec. 50. The directors shall cause a record to be kept of all stock subscribed and transferred, and of all business transactions, and their books and records shall at all times be open to the inspection of any and every stockholder; they shall also, when required, present to the stockholders reports in writing of the situation and amount of business of the corporation, and declare and make such dividends of the profits, from the business of the corporation, not reducing the capital stock while they have outstanding liabilities. 1860, p. 175, Sec. 15.

Sec. 51. The directors of any corporation organized under this title, have power to establish one or more offices without this state, and transact business thereat; *Provided,* That an office shall always 1860, p. 176, Sec. 16.

be maintained in this state where legal process may be served on the person in charge thereof.

C. S., p. 331, Sec. 307 Amended.

Sec. 52. No corporation shall be formed under this title to continue more than thirty years.

C. S., p. 334, Sec. 332.

Sec. 53. Mutual Insurance Companies, organized under the provisions of this chapter, may render their premium notes a lien upon the whole or any part of the real estate upon which the property insured is situate, whether such real estate is or is not exempt from other liabilities as a homestead; but such lien shall not attach until the premium note stating the property on which it is a lien is filed for record and treated in the same manner as though it were a mortgage from the maker thereof to the company, except that it need not be acknowledged.

GENERAL LAWS OF 1870, CHAPTER 26.

AN ACT TO AMEND SECTION FORTY-FIVE, TITLE TWO, AND SECTION 155, OF CHAPTER 34, OF THE GENERAL STATUTES, RELATING TO CORPORATIONS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That Section 45, of Title 2, Chapter 34, of the general statutes, be and the same is hereby amended so as to read as follows:

Sec. 45. Any number of persons NOT LESS THAN THREE, who have or shall, by the artcles of agreement in writing, associate according to the provisions of this title, under any name assumed by them for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing iron, copper, or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate, or other mineral substance, or for constructing, leasing, or operating docks, warehouses elevators, or hotels, or as a mutual savings fund loaned, or building association, or manufacturing and furnishing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, chemical, TRANSPORTATION, OR OTHER LAWFUL BUSINESS, and who have or shall comply with the provisions of this title, shall, with their associates, successors, and assigns constitute a body corporate and politic under the name assumed by them in their articles of association. *Provided*, No

company shall take a name previously assumed by any other company. Any mutual saving fund, loan or building association as authorized to loan its funds and to secure such loans by mortgage or other security upon real or personal estate and to enforce such mortgage and security, and any premiums taken by any such association for the preference or priority of such loans, shall not be deemed interest within the meaning of section one, of chapter twenty-three, of the general statutes. Any such association is authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate upon which such association may have or hold any mortgage, judgment, lien, or other encumbrance, or in which such association may have an interest, and the real estate so purchased, to sell, convey, lease or mortgage at pleasure to any person or persons whatever.

Sec. 2. That Section 155, title 8, of said chapter thirty-four, be and the same is hereby amended by adding thereto the following, viz:

The members of any corporation now or hereafter organized under the provisions of this chapter, and the directors and managers thereof, may meet and transact business without the state the same as within the state, but no corporation or association created or existing, or which shall exist under this act, shall cease or expire from neglect on the part of the corporation to elect directors or officers at the time mentioned in their by-laws, and all officers elected by such corporation or associa-

tion shall hold their offices until their successors are duly elected.

Sec. 3. This act shall take effect and be in force from and after its passage.

SESSION LAWS OF 1874, SEC. 16, PAGE 22.

The personal property of express or *transportation companies* shall be listed and assessed in the county, town or district where the same is usually kept.

FROM BISSELL'S STATUTES AT LARGE, 1873, VOL. 1, PAGE 419.

TITLE I.

OF CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

Section 1. *Any Number of Persons not less than Five may become incorporated.*

Any number of persons,—not less than five,—may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals, or slack-water navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

Sec. 2. *Shall organize by adopting and signing Articles.*—They shall organize by adopting and signing articles of incorporation, which shall be recorded in the office of the register of deeds of the county where the principal place of business is to be, and also in the office of the secretary of State, in books kept for such purpose.

Bissell 1873, page 421, Sec. 13.

"*Right of Way Obtained, How.*—Any corporation organized or reorganized under the provisions of this title, may obtain the right of way over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites and grounds for depots, shops, and other buildings requisite for the proper carrying on of the business

to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices or other erection necessary for the convenient prosecution of their enterprise, all and any lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills or other property, and to canal in and along the valley of any such river, stream, lake or watercourse, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this title provided."

Bissell's Statutes at Large, 1873, Title I, Ch. 17, p. 420:

Sec. 5. *Corporation may continue how long.*— No such corporation shall be formed to continue more than fifty years in the first instance, but it may be renewed from time to time for periods not longer than fifty years; *Provided*, that three-fourths of the votes cast at any regular election for the purpose, are in favor of such renewol, and those desiring a renewal purchase the stock of those opposed thereto at its current value."

TITLE II. (p. 443) SAME VOL. OF CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE 1.

Sec. 98. (Sec. 45 as Amended by Act of March 10, 1873) *Who may incorporate under this Title and How.*—Any number of persons not less than three, who have, or shall by articles of agreement in writing, associate according to the provisions of this title under any name assumed by them for the purpose of engaging in or carrying on the business of mining, smelting or manufacturing iron, copper or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate, or other mineral substance, or for constructing, leasing or operating docks, warehouses, elevators, or hotels, or as a mutual savings fund, loan, or building association, manufacturing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, TRANSPORTATION, OR OTHER LAWFUL BUSINESS, and who have or shall comply with the provisions of this title, shall, with their associates, successors, and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement; *Provided,* no company shall take a name previously assumed by any other company. Any mutual saving fund, loan, or building association, as authorized to loan funds and to secure such loans by mortgage or other security, and any premiums taken by any such association for the preference or priority of such

loans, shall not be deemed interest within the meaning of section one of chapter twenty-three of the general statutes. Any such association is authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate, upon which such association may have or hold any mortgage, judgment, or lien, or other incumbrance, or in which such association may have an interest, and the real estate so purchased, to sell, convey, lease, or mortgage at pleasure to any person or persons whatsoever.

Sec. 105 (52). *Duration of corporation.*—No corporation shall be formed under this title to continue more than thirty years.

GENERAL STATUTES OF 1894, VOL. 1, CHAP. 34.

TITLE I.

CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

Section 2592. Works of Internal Improvement, —Who may be incorporated,—power, restrictions, right of purchase by city or village, when.

Any number of persons NOT LESS THAN FIVE, may associate for incorporation and become incorporated under and according to this title for the construction, maintenance and OPERATION OF ANY WORK OR WORKS OF INTERNAL IMPPROVEMENT REQUIRING THE TAKING OF ANY PRIVATE PROPERTY, OR ANY EASEMENT THEREIN, for public use, including railways, telegraph lines, canals, slackwater, or other navigation upon any watercourse, bay or lake, dams to improve or create a water supply or power for public use and any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power; and any citizens of the United States, not less than nine in number, owning any railway now or hereafter constructed for public use within the state for TRANSPORTATION OF PERSONS or property, or organized for the purpose of maintaining and operating under any lease or contract a railroad constructed for like public use, may, by making and filing articles of associa-

tion under and according to this title, acquire and enjoy the rights, powers, privileges and franchises hereinafter granted, and may by filing in the office of secretary of state a resolution of such corporation expressing its intent to construct, maintain and operate any branch line, become empowered to construct, maintain and operate the same in connection with its main line, subject, however, to the provisions of this title and the general laws of this state, and any corporation formed hereunder may construct, maintain and operate telegraph lines along or over its lines of railroad, and any corporation formed hereunder or under any act hereby amended, may charge and collect a reasonable compensation for its service. But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village, A RAILWAY OF ANY KIND, or any subway, pipe line or other conduit for supplying the public with water, GAS LIGHT, electric light, heat, POWER OR TRANSPORTATION or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter AND WITHOUT first making just compensation therefor, as herein provided. Provided, that the State of Minnesota shall at all times have full power and authority to supervise and regulate the business methods and management of any corporation existing and operating hereunder, and shall also have full power and authority at all times to fix the compensation

which shall or may be charged or received by any corporation existing and operating hereunder. AND ANY CORPORATION ORGANIZED UNDER THIS ACT SHALL BE SUBJECT TO ANY CONDITION FROM TIME TO TIME IMPOSED BY SUCH VILLAGE OR CITY, THROUGH ITS BOARD OF TRUSTEES OR CITY COUNCIL AND PROVIDED FURTHER, THAT THE COMMON COUNCIL OF ANY CITY AND THE BOARD OF TRUSTEES of any village at the end of each and every five years from and after the granting of any franchise for the construction of any STREET RAILWAY, TELEPHONE, WATER WORKS, GAS AND ELECTRIC LIGHT, HEAT OR POWER WORKS OR ANY OR ALL OF THEM, SHALL HAVE THE RIGHT, WHEN AUTHORIZED SO TO DO BY A TWO-THIRDS VOTE of the electors of such municipality as hereinafter provided, to acquire the same by purchase and thereafter operate the same, upon paying to the company, corporation or person owning the franchise the full and true cost and value thereof, to be determined by the usual proceedings for acquiring public property for public use under the right of eminent domain upon petition of the authorities of such municipality. Except that none of the commissioners so appointed to appraise the same shall be residents of the said municipality, and except further, that all the property, if any thereof, owned by the corporation in interest under and in connection with said franchise shall be included in such proceeding and purchased and ac-

quired hereunder. Before any such property shall be acquired by any such municipality or such proceedings be instituted the proposition to acquire the same shall be submitted to a vote of the electors of said municipality at a special election called for that purpose within the three months immediately prior to the expiration of any five years of said franchise and then only when authorized by two-thirds of the votes cast at said election. The consideration paid for any such works or property acquired under this provision, shall be first applied to the payment of any bonds upon the property or works acquired, and the balance, if any, to the person, company or corporation owning said franchise.

Section 2642. *Right of Way over Highways,—Connection with other Railroads, how made,—Order of Court,—Bond.*

If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation, or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals.

TITLE 2.
CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE I.

Section 2794. *For what purposes organized,—Powers,—Building Associations,—Execution of Articles by Executors, etc.*

Any number of persons, NOT LESS THAN THREE, who have, or shall, by articles of agreement in writing, associate, according to the provisions of this title, under any name assumed by them, for the purpose of engaging in or carrying on the business of mining, smelting, or manufacturing iron, copper, or other minerals; or for producing the precious metals; or for quarrying and marketing any kind of ore, stone, slate, or other mineral substance; or for constructing, leasing, or operating docks, warehouses, public halls, elevators, or hotels; or saving fund, loan, or building association, (or association for buying, owning, improving, selling, and dealing in lands, tenements, and hereditaments;) or FOR MANUFACTURING GAS, or any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, TRANSPORTATION OR OTHER LAWFUL BUSINESS, and who have or shall comply with the provisions of this title, shall, with their associates, successors, and assigns, constitute a body corporate and politic, under the name assumed by them in the articles of agreement; *Provided*, no company shall take a name previously assumed by any other company.

Any such association or corporation for buying, owning or improving, selling and dealing in, lands, tenements and hereditaments, real, mixed and personal estate and property, shall have, and may exercise and enjoy, all the franchises, rights, powers and privileges of a corporation, as provided in this title and act; and the same is made capable and authorized in law and in equity to have, own, purchase, receive, possess, and retain, to itself and successors, lands, tenements and hereditaments, real, personal and mixed estate and property, and to use and enjoy the same, and the same improve by erecting and constructing thereon dwelling houses and other buildings, erections, and structures, and otherwise to enhance, build upon, and improve the same to every extent, and in such manner and for such purpose as may become necessary, or as such association or corporation may deem proper or advantageous; and to sell, convey, lease, let, mortgage, or otherwise dispose of, charge, or incumber such lands, tenements, and hereditaments, real, mixed, and personal property and estate, or any of the same, or any right or interest therein, at pleasure, and in such manner and on such terms as such corporation or association may determine by order of its directors, or establish by its by-laws; and for that purpose to make and deliver, and in like manner accept and receive, all necessary and proper deeds, conveyances, mortgages, leases, and other contracts and writings obligatory, and to have and exercise all necessary rights, franchises, muniments, estate, powers, and privileges necessary

to that end; and such association or corporation is authorized to loan money and funds, and secure such loan by mortgage, or other security, and any premium taken by such association for the preference or priority of such loans, or for the preference or priority on any sale or disposition of its lands, tenements, or hereditaments, real, personal, or mixed property or estate, or any premium for preference or priority taken by any mutual building association for any loan of its funds by such building association, shall not be deemed interest within the meaning of any law of this state; nor shall any excess of such premium over any rate of interest permitted by the laws of this State be deemed or held, in any court of law or equity, to be usury. Any association organized under this title is authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, and to hold any real estate upon which such associates or association may have or hold, any mortgage or judgment or lien or other incumbrance, or in which such associates or association may have an interest; and the real estate so purchased, to sell, convey, lease, or mortgage, at pleasure, to any person or persons, or purchasers whatever; *Provided, however*, that no mutual building association, nor association for buying, selling, and dealing in lands, tenements, and hereditaments, shall loan its funds except to its own members. The executors or trustees under any will, or one or more of such executors or trustees, who are authorized, requested, or directed by the provisions of any will to or-

ganize a corporation for any of the purposes mentioned in this section, or the general laws of this state, may, individually or as executors, or together with the legatees mentioned in the will; or one or more of such executors, trustees, or legatees, may sign, execute, and acknowledge articles of incorporation under the provisions of the act of which this is amendatory for the purpose of carrying out the intention of the testator, and for forming and organizing such corporation, and in such case may transfer and convey to such corporation any property of the testator mentioned and referred to in such will; and said executors, trustees, or legatees, or such of them as shall execute the articles of incorporation, may subscribe to the stock of such corporation to the amount of the value of the property mentioned and referred to in such will; and such executors or trustees may convey the same to such corporation in payment of the stock so issued and subscribed without application to or authority from any court.

REVISED LAWS OF 1905, CHAPTER 58, CORPORATIONS.

2841. *Public Service Corporations.*—Corporations may be organized for the construction, acquisition, maintenance, or operation of any work of internal improvement, including railways, street railways, telegraph and telephone lines, canals, slackwater or other navigation, dams to create or improve a water supply or to furnish power for public use, and any work for supplying the public, by whatever means, with water, light, heat, or power, including all requisite subways, pipes, and other conduits. But no corporation so formed shall construct, maintain, or operate a railway of any kind, or any subway, pipe line, or other conduit in or upon any street, alley, or other public ground of a city or village, without first obtaining from, and compensating said city or village for, a franchise conferring such right.

2842. *State and Local Control—Eminent Domain.* The State shall at all times have the right to supervise and regulate the business methods and management of any such corporation, and from time to time to fix the compensation which it may charge or receive for its services; and every such corporation obtaining a franchise from a city or village shall be subject to such conditions and restrictions as from time to time may be imposed upon it by such municipality. Every such corporation may acquire, by right of eminent domain, such private property as may be necessary or convenient for

the transaction of the public business for which it was formed; *Provided*, that no street railway company shall have or exercise such right within the limits of any city or village (2592, 2604, 2619; '95 c. 19).

2843. *Municipality May Purchase.*—The council of any city or village, at the end of any period of five years from the granting of a franchise for the operation of any street railway, telephone, water works, gas works, or any electric light, heat or power works, when authorized so to do by a two-thirds majority of the votes cast upon the question, may acquire and thereafter operate the same, upon paying to the corporation or person owning the franchise the value of such property, to be ascertained in the manner provided by law for acquiring property under the right of eminent domain, upon petition of its governing body. Such vote shall be taken at a special election called for that purpose, and held within three months next preceding the expiration of said five-year period. The consideration for such works or property shall first be applied to the payment of any incumbrances thereon, and the remainder, if any, shall be paid to the owner of said franchise (2592).

2844. *Manufacturing and Mining Companies*—Corporations may be formed:

1. For carrying on any kind of manufacturing or mechanical business not incompatible with an honest purpose.

2. For the mining, smelting, reducing, refining, or working of ores or minerals, for working coal

mines or stone quarries, or for buying, working, selling, or dealing in mineral lands, or for any one or more of the purposes mentioned in this paragraph (2794, 2805, 2827).

See 1905 c. 93.

2846. *Trading Companies, Etc.*—Corporations may be formed for any of the following purposes:

1. Constructing, leasing, or operating docks, warehouses, elevators, public halls or hotels.

2. Carrying on any kind of lumbering, agricultural, dairying, mercantile, chemical, transportation, or other lawful business not otherwise provided for in this chapter.

3. Buying, selling, and improving lands and tenements (2794).

CHAPTER 200, SPECIAL LAWS OF 1881 (EXTRA SESSION).

AN ACT CONFERRING CERTAIN RIGHTS UPON THE DULUTH STREET RAILWAY COMPANY.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That the Duluth Street Railway Company, a corporation organized and existing under the general railroad law of this state, be and is hereby granted during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line, with all necessary tracks for turn-outs, side-tracks and switches in any of the streets of the Village of Duluth and its suburbs, including New London and Oneota.

Sec. 8. The said company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; *Provided*, that the charge for carrying a person, including hand baggage from one point to another within the village limits, whether by one or more lines operated by the same company, shall not exceed five (5) cents on any one (1) line; *Provided, Further*, that there is hereby reserved to the Village of Duluth the right to alter and regulate the rate to be charged by said company, their successors and assigns for the transportation of passengers in said village at the expiration of five (5) years from the passage of

this act, and every five (5) years thereafter, fixing the same at such rates as the Village Council may deem just and reasonable; *Provided,* further, that the said council shall not reduce the passenger fare below five (5) cents over any one (1) continuous line, and what shall be considered a continuous line may be designated by the said Village Council, but that the said Council shall not designate any such continuous line of more than three (3) miles in length.

SPECIAL LAWS OF MINNESOTA, 1881, CHAPTER 76 (PAGE 418).

AN ACT TO AMEND AND CONSOLIDATE THE CHARTER OF THE CITY OF MINNEAPOLIS.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The act entitled "An act consolidating the cities of St. Anthony and Minneapolis and incorporating the same into one city by the name of Minneapolis," approved February 28, A. D., 1872, and the subsequent acts of the legislature amending the same, are hereby consolidated and amended so that the same shall constitute the charter of said City of Minneapolis, which shall read as follows:

(Page 434, same volume.)

POWER TO ENACT ORDINANCES AND THEIR FORCE.

Sec. 5. The City Council shall have full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient, and in and by the same to declare and impose penalties and punishments, and enforce the same against any person or persons, who may violate the provisions of any ordinance, passed and ordained by it, and all such ordinances are hereby declared to be and to have the force of law, PROVIDED THAT

THEY BE NOT REPUGNANT to the laws of the United States OR OF THIS STATE, and for these purposes the said city council shall have authority by such ordinances.

(Page 437, same vol.)

Thirty-Fourth. To license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight, and to regulate their charges therefor; to prescribe standing places or stations within the streets where such hacks, drays or other vehicles used for such carriage may stand or remain while waiting for business or orders, and to designate such standing or waiting places in the licenses to such draymen, hackmen or other persons, and to prohibit them from standing or waiting at any other place within such streets and to regulate and prescribe standing places for all vehicles, going to or waiting at any railroad depot or station in said city, and to authorize the mayor or chief of police of said city to regulate and direct the location of vehicles at such railroad depots or stations.

CHAPTER 105, PAGE 132, G. L. 1883.

AN ACT TO AMEND SECTION ONE HUNDRED AND TWENTY-ONE (121) OF TITLE TWO (2) OF CHAPTER THIRTY-FOUR (34) OF THE GENERAL STATUTES OF A. D. ONE THOUSAND EIGHT HUNDRED AND SEVENTY-EIGHT (1878).

Be it enacted by the legislature of the State of Minnesota:

Section 1. That section one hundred and twenty-one (121) of title two (2) of chapter thirty-four (34) of the General Statutes of the State of Minnesota be, and the same is hereby, amended to read as follows, viz:

Sec. 121. The amount of capital stock of every such corporation shall be fixed and limited by the stockholders in their articles of association, and shall be divided into shares of not less than fifty (50) and not more than one hundred ($100) dollars each, but every such corporation may increase its capital stock and the number of shares therein at any meeting of the stockholders specially named for that purpose.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 3, 1883.

CHAPTER XXX, G. L. MINN. 1876, PAGE 47.

AN ACT TO AMEND TITLE 1, OF CHAPTER 34, OF THE GENERAL STATUES, RELATING TO CORPORATIONS.

Be it enacted by the legislature of the State of Minnesota:

Section 1. That title 1, of chapter 34, of the general statutes, relating to corporations, be and the same is amended by adding thereto the following, to-wit:

That in all cases *where any railroad corporation* of this state, whether created by special act of incorporation or organized under the provisions of this act, or of any legislative enactment of this state or of the late territory of Minnesota, hath heretofore executed, or shall hereafter execute, any mortgage or deed of trust upon the whole or any part of its railroad, division or branch thereof constructed or authorized to be constructed, with the franchises pertaining to the same, to secure the payment of its corporate bonds, and the road, franchises and property covered by such mortgage or deed of trust, may be foreclosed and sold, in accordance with the provisions of such trust deed and mortgage, for the use and benefit of the holders of such bonds, the purchaser at such sale, by virtue of such purchase, and the proper certificate thereof or conveyance thereon shall become invested with all rights, benefits, privileges, property, immunities franchises and interests so foreclosed and embraced or included in the said mortgage or trust

deed, and the said sale, which were held at the time of the execution of such mortgage or deed of trust, or afterwards acquired by the company making such mortgage or deed of trust and whether the said mortgage or deed of trust and sale shall have included the corporate franchises of such company, or not, the said persons for whose benefit such purchase shall have been made as aforesaid, may organize as hereinafter provided, and from the time of such organization shall be to all intents and purposes, a corporation, with all and singular the corporate powers, rights, franchises, privileges and immunities which were held at the time of the execution of such mortgage or deed of trust, or afterwards acquired, by the company making such mortgage or deed of trust, so far as applicable to the road and property so purchased. And in the management and operation of the road or lines as well as in the use and enjoyment of the property, franchises and interests thus acquired, and in the conduct of all business growing out of such purchase, shall be entitled to all and singular the same rights, powers, privileges, immunities and advantages theretofore granted to or bestowed upon the corporation making such mortgage or deed of trust, which were applicable to the road, property and franchises so purchased while held and controlled by the last mentioned corporation, and may have, use and exercise the same in their corporate capacity, under and through the organization herein provided for, in like manner in all respects as the corporation making such mortgage or deed of trust

might or could have done, had no foreclosure or sale taken place. The person or persons so purchasing shall, by themselves or their authorized attorneys or proxies, meet within thirty days after the delivery of the conveyance under such sale, or certificate of sale delivered, at some place within this state, of which, and the time of such meeting, notice shall be published, by the persons named as purchasers in such deed or certificate of sale, by publication in some of the daily newspapers of St. Paul, for at least ten days prior to the time of such meeting, at which time and place the said persons so purchasing shall adopt a corporate name for the proposed new organization, and may proceed without further notice and elect a board of not exceeding nine directors, and such board may thereupon elect a president, secretary, treasurer, and such other officers as the corporation making such mortgage or trust deed may theretofore or prior to such foreclosure have been authorized to elect, and adopt a corporate seal. From the time of such election of officers and the adoption of a corporate seal, the organization shall be deemed complete, and the company thus organized shall become and be a body corporate, under the name so adopted as aforesaid by the purchasers at the mortgage sale, and clothed as such, with the rights, powers, privileges, franchises, immunities and advantages hereinabove, in such case, provided. Subsequent elections of board of directors and other powers and duties of the corporation so organized, shall be had and performed in accordance with the provisions of law in

that behalf enacted, prior to such foreclosure, for the government of the corporation making such mortgage or deed of trust, and the same, together with all legislative acts relative to the corporation last mentioned shall continue in force and be applicable to such corporation so organized. It shall be the duty of such new organization, within thirty days after such organization shall be perfected, to make and certify under its corporate seal, attested by its president and secretary, a statement showing the date of such organization, the corporate name by it adopted, the amount of its capital stock, issued and unissued, common and preferred, the name of its president, secretary, treasurer, and other general officers, the number and names of its directors so chosen at said meeting, and cause the same, together with the conveyance or certificate of sale, made to the purchasers upon the foreclosure, to be recorded in the office of the Secretary of State of this State; and such record or a certified copy of such record of said proceedings, shall be legal evidence of the existence of such corporation or organization. *Provided, further*, that nothing herein contained shall be construed to change or impair the force of any decree of foreclosure heretofore made, or any of the terms or provisions thereof. *Provided, however,* that such court shall provide in such foreclosure, decree, or otherwise, that such purchaser or purchasers shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employe of such company; and to provide that such purchas-

er and such new corporation so by them to be formed under the provisions of this act shall complete all legal and subsisting contracts for sale of the lands of such company, and upon performance on the part of any purchaser of such lands, to convey the real estate so purchased in pursuance of the contract or contracts so subsisting; and that such court also provide in such decree, or otherwise, so as to save and protect the possessory and other rights and property of any person, persons or copartnership in and to any warehouse, side track or other structure erected upon the right of way of such defaulting company, so as to save, preserve and protect the equitable rights of all parties interested. *And provided, further,* that nothing in this act contained shall be construed as repealing, modifying, or impairing, chapter 105 or chapter 106, of the special laws of 1874, or chapter 49 of the special laws of 1875, or any rights secured or intended to be secured or protected under said chapters, or either of them.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 6th, 1876.

—o—

The above chapter is an amendment of title one of chapter 34. Under and by provisions of the above chapter the St. Paul City Railway Company was organized by the foreclosure of a mortgage, and re-organization in pursuance of said act, as fully indicated, in the case of *Nash v. Lowry,* 37 Minn. 261.

This incorporation has been indirectly recognized by the legislature by confirming an ordinance granted the St. Paul City Railway Company by chapter 297 of the special laws of 1883, also by the Supreme Court in the *Nash* case.

CHAPTER XXIII, PAGE 45, G. L. 1868.

AN ACT TO AMEND SECTION FORTY-FIVE, OF CHAPTER THIRTY-FOUR, OF THE GENERAL STATUTES, RELATING TO CORPORATIONS.

Be it enacted by the legislature of the State of Minnesota:

Section 1. That section forty-five, of chapter thirty-four, of the general statutes, be amended so as to read as follows:

Section 45. Any number of persons NOT LESS THAN THREE, who shall, by articles of agreement in writing, associate, according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting, or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical chemical insurance OR TRANSPORTATION BUSINESS and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate, under the name assumed by them in their articles of associations:

Provided, No company shall take a name previously assumed by any other company.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 4, 1868.

CHAPTER LXXVII, PAGE 93, G. L. 1869.

AN ACT TO AMEND SECTION FORTY-FIVE, TITLE TWO, CHAPTER THIRTY-FOUR OF THE GENERAL STATUTES, RELATING TO CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE ONE.

Be it enacted by the legislature of the State of Minnesota:

Section 1. That section 45, of Title 2, of Chapter 34 of the general statutes, be amended so as to read as follows:

Section 45. Any number of persons, not less than three, who shall by articles of agreement in writing, associate, according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on, mining, smelting or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical or chemical business, or for the purpose of erecting, equipping, maintaining or operating a hotel, and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate under the name assumed by them in their articles of association: *Provided*, No company shall take a name previously assumed by any other company.

Sec. 2. This act shall take effect and be in force from and after its passage.

Approved March 5, 1869.

ORGANIZATION OF THE ST. PAUL CITY RAILWAY COMPANY.

Statement of the Saint Paul City Railway Company made under and pursuant to an act of the legislature of the State of Minnesota, approved March 6th, 1876, entitled "An act to amend title 1, chapter 34, of the general statutes relating to corporations.

Whereas, in pursuance of a judgment of the District Court of the State of Minnesota, in and for the County of Ramsey, rendered on the twenty-eighth day of April, 1877, in an action wherein Thos. Cochran, Jr., trustee (substituted in place of John S. Prince, resigned) is plaintiff, and the St. Paul Street Railway Company and Lafayette Shaw were defendants, brought to foreclose a certain mortgage or deed of trust, with a supplemented deed thereto, executed by said company, of the railway property and franchises of said company in said judgment set forth and by proper proceedings on said judgment the said mortgaged premises were, on the twenty-eighth day of September, 1877, sold by the sheriff of said County of Ramsey, to the said Thomas Cochran, Jr., trustee, as aforesaid.

And whereas, on the seventeenth day of October, 1877, the said sheriff duly executed and delivered to the said Thomas Cochran, Jr., trustee, a certificate of said sale, dated the day and year last mentioned, wherein the said Thomas Cochran, Jr., trustee, is duly named as purchaser aforesaid.

And whereas, The said Thomas Cochran, Jr., being desirous of forming a new organization pursuant to the said act of the legislature of the State of Minnesota, approved March 6th, 1876, entitled, "An act to amend title I, of chapter 34, of the general statutes relating to corporations," gave due notice by publication as required by said act of the legislature, of a meeting for the purpose of forming such new organization, as provided by said statute.

And whereas, In accordance with said statute, and in pursuance of said notice, a meeting thereon was duly held on the thirtieth day of October, A. D. eighteen hundred and seventy-seven, at the City of St. Paul, in the State of Minnesota, whereat a corporate name for the proposed new organization was adopted and a board of seven directors were duly elected therefor, and said board of directors thereon duly convened and organized, and duly elected a president, secretary and treasurer; and adopted a corporate seal of and for said new organization, whereby the said new organization became and was complete, and became and was a body corporate under the name so adopted as aforesaid and hereinafter stated, and by virtue of said statute. Now, therefore, this statement witnesseth to all whom it may concern:

First—That the date of said new organization and body corporate formed as aforesaid, is the thirtieth day of October A. D. eighteen hundred and seventy-seven.

Second—That the corporate name of said new organization and body corporate adopted by it, is "The St. Paul City Railway Company."

Third—That the amount of its capital stock, being common stock, is three hundred thousand dollars, and is unissued.

Fourth—That the names of its general officers so chosen are as follows, to-wit: The name of its president is Alfred H. Porter of the City of New York, the name of its secretary is William G. Dominick, of the City of New York, and the name of its treasurer is James R. Walsh, of the City of Saint Paul.

Fifth: That its directors are seven in number and their names are as follows, to-wit: The said Alfred H. Porter, the said William G. Dominick, the said James R. Walsh, William H. Phillips, of the City of New York, Henry Horn of the City of Saint Paul, Frank F. Mix, of said City of Saint Paul and Theodore E. B. Case, of said City of St. Paul, so chosen at said meeting, all of which the said new organization, to-wit:—the said "The St. Paul City Railway Company," has caused to be certified by these presents under its corporate seal hereunto affixed and to be attested by its president and secretary this thirtieth day of October, A. D. eighteen hundred and seventy-seven.

ALFRED H. PORTER, (Seal)
President of the St. Paul City Railway Co.

ARTICLES OF INCORPORATION OF THE DULUTH STREET RAILWAY COMPANY.

First.

The name of this corporation is the Duluth Street Railway Company. The general nature of its business is to construct and operate railways in the streets and highways of the village of Duluth and its suburbs in the County of St. Louis and State of Minnesota, and the principal place of transacting the said business is in the village of Duluth.

Second.

The time of commencement of said corporation is the 25th day of October, A. D., 1881, and the period of its continuance shall be fifty years thereafter.

Third.

The amount of capital stock of said corporation is one hundred thousand dollars to be paid in as follows:

Five per cent of the same at the time of subscribing for said stock and the balance in installments from time to time as the same shall be ordered by vote of the stockholders.

Fourth.

The highest amount of indebtedness or liability to which said corporation shall at any time be subject is fifty thousand dollars.

Fifth.

The names and places of residence of the persons forming the said association for incorporation are Albert S. Chase, John M. Rich, Frank W. Eaton, Charles M. Wilson, Alois Ebmer and William W. Billson, all residents of Duluth, Minnesota, and S. L. Payless of St. Paul, Minnesota.

Sixth.

The names of the first Board of Directors of said corporation are the same as the names of the above mentioned incorporators. The government of the said corporation and the management of its affairs shall be vested in its Board of Directors, which shall be elected on the first Tuesday of July, in each year.

Seventh.

The number and amount of shares in the capital stock of the said corporation is one thousand shares of one hundred dollars each.

Adopted, signed and sealed this 17th day of October, A. D., 1881.

Albert S. Chase,	(Seal).
John M. Rich,	(Seal).
Frank W. Eaton,	(Seal).
Charles M. Wilson,	(Seal).
S. L. Payless,	(Seal).
Alois Ebmer,	(Seal).
William W. Billson,	(Seal).

ARTICLES OF INCORPORATION OF THE MINNEAPOLIS & ST. PAUL SUBURBAN RAILWAY COMPANY.

Know all men by these presents, that we the undersigned, do hereby associate ourselves together for the purpose of becoming a body corporate under and pursuant to the provisions of title 2 of Chapter 34 of the General Statutes of Minnesota for the year 1894, together with the acts amendatory thereof; and for that purpose do hereby adopt the following articles of incorporation:

ARTICLE I

The name of this corporation shall be "Minneapolis & St. Paul Suburban Railway Company."

The general nature of the business of said corporation shall be to purchase, lease, build, own and operate suburban street railways, extending from the city limits of the Cities of St. Paul and Minneapolis to and into outlying cities, towns and villages within the State of Minnesota; the following being among the lines of street railway which this corporation shall have the right to either build or acquire by purchase or lease, and to own, operate and maintain after such building or acquisition.

(1) A line of street railway beginning at the easterly limits of the City of St. Paul at such point as the board of directors may designate, and running thence in a northeasterly direction along such route as shall be determined upon by said company,

to the Village of North St. Paul, and through said Village of North St. Paul, along such streets and avenues or by such route as shall be designated or acquired therefor; thence continuing in a northerly or northeasterly direction to Wildwood,—so-called, on White Bear Lake; thence along the shore of White Bear Lake to and into the Village of White Bear, and through said Village of White Bear, along such streets or route as shall be designated or acquired for that purpose.

And in connection with said line another line extending from said Wildwood in a general eastern direction to the City of Stillwater, and along such route, streets and avenues within the city limits of the City of Stillwater as shall be designated or acquired for that purpose, to the southern limits of said City of Stillwater, and thence to the Village of South Stillwater by such route as shall be determined upon by said company, and along and over such streets and avenues within said Village of South Stillwater as shall be designated or acquired for that purpose.

(2) Another line extending from the westerly limits of the City of Minneapolis, at or near the point where the Lake Harriet Street Railway line, if extended, would intersect the western city limits of said City of Minneapolis, and running in a westerly direction along such route as shall be determined upon by said company to the Village of Hopkins, in Hennepin County; thence through the Village of Hopkins along and upon such route as shall be designated and determined upon to Lake

Minnetonka, and to such point or points on said lake as may be determined upon by said company.

(3) Another line beginning at Camden Place, in the City of Minneapolis; thence in a general northwesterly direction to the City of Anoka, along such route as shall be determined upon by said company, and over such streets or avenues within the city limits of the City of Anoka as shall be designated or acquired for that purpose.

(4) Another line beginning at the southely limits of the City of St. Paul, at or near where the same intersects Annapolis street, and extending thence in a general southeasterly direction to the City of South St. Paul; thence over such streets and avenues within the city limits of the City of South St. Paul as shall be designated or acquired for that purpose.

Also to lease, purchase or build, own and operate such other line or lines of suburban street railway within the State of Minnesota as the board of directors of said company may determine upon hereafter.

Also to lease, purchase, build, own and operate by either electric or steam power, such steamboats, launches, or other boats as may be determined upon by said company, upon White Bear Lake, Lake Minnetonka and such other lakes within the State of Minnesota as may be determined upon by this company.

Also to lease, buy and own all real estate necessary for or incidentally connected with the build-

ing and operation of the street railway lines and the business herein provided for.

Also to purchase and own stock or stocks of suburban or other street railway companies and to purchase or lease railway lines within the State of Minnesota.

Also to lease, construct, own and operate electric or other power stations, electric lighting plants or stations, and in connection therewith to construct, maintain and operate electric lighting plants and to furnish electric light or power to either persons, corporations, cities, towns or villages, and generally to do any and all things necessarily connected with or incidental to the business herein authorized and provided for.

ARTICLE II.

The principal place for the transaction of the business of this corporation shall be at the City of St. Paul, Ramsey County, Minnesota; but an office for the transaction of the business of said corporation may also be maintained in the City of Minneapolis, Hennepin County, State of Minnesota.

The time of the commencement of this corporation shall be the 15th day of June, A. D., 1899, and the period of its continuance shall be thirty (30) years.

ARTICLE III.

The amount of capital stock of this corporation shall be three hundred thousand dollars ($300,-

000), and shall be paid from time to time, and at such times as the board of directors shall require.

ARTICLE IV.

The highest amount of indebtedness or liability to which this corporation shall at any time be subject is one million three hundred thousand dollars ($1,300,000), including bonded indebtedness.

ARTICLE V.

The names of the places of residence of the persons forming this corporation are as follows:

Thomas Lowry, Minneapolis, Minnesota.
C. G. Goodrich, Minneapolis, Minnesota.
M. B. Koon, Minneapolis, Minnesota.
J. F. Calderwood, Minneapolis, Minnesota.
M. D. Munn, St. Paul, Minnesota.

ARTICLE VI.

The government of this corporation and the management of its affairs shall be vested in a board of five (5) directors, and such executive and ministerial officers as the board of directors shall designate. The said board of directors shall be elected annually on the first Tuesday in June of each year. The first annual meeting for the election of directors shall be on the first Tuesday in June, A. D., 1900.

The first board of directors of this corporation shall be Thomas Lowry, C. G. Goodrich, M. B.

Koon, J. F. Calderwood and M. D. Munn, who shall hold office until the first Tuesday in June, A. D., 1900, or until their successors are elected and qualified.

ARTICLE VII.

The number of shares of the capital stock of this corporation shall be three thousand (3,000) of one hundred ($100) dollars each.

In witness whereof, we have hereunto set our hands and affixed our seals this first day of June, A. D., 1899.

Thomas Lowry, (Seal).
C. G. Goodrich, (Seal).
M. B. Koon, (Seal).
M. D. Munn, (Seal).
J. F. Calderwood, (Seal).

In presence of O. O. Edwards and A. R. Taylor.

ARTICLES OF INCORPORATION OF BRAINERD STREET RAILWAY COMPANY.

We, the undersigned, residents of the city of Brainerd, in the counties of Crow Wing and Cass in the state of Minnesota, do hereby associate ourselves together and for the purpose of forming a corporation under and pursuant to the provisions of TITLE ONE, CHAPTER THIRTY-FOUR OF THE GENERAL STATUTES OF MINNESOTA, 1878, AND THE SEVERAL ACTS AMENDATORY THEREOF, do adopt the following articles of incorporation.

Article 1. The name of this corporation shall be Brainerd Street Railway Company. The general nature of the business of this corporation shall be the building, equipping and operating of a line or lines of single or double track for a PASSENGER RAILWAY LINE, with all necessary tracks for turn-outs side tracks and switches in any or all the streets and on or over any or all bridges in the present or future limits of said city and the purchasing and acquiring of any and all property, real or personal, necessary or convenient, and the transaction of such other business as may be necessary to more effectually carry out the purpose of this organization. The principal place of transacting the business of said corporation shall be the city of Brainerd.

Article 2. The time of commencement of said corporation shall be August second, 1886, and shall continue for THE PERIOD OF FIFTY YEARS.

Article 3. The amount of capital stock of said corporation shall be one hundred thousand dollars and the same shall be paid in at such times and in such amounts as the board of directors may determine.

Article 4. The highest amount of indebtedness or liability exclusive of bonded indebtedness, to which said corporation shall at any time be subject shall not exceed the sum of twenty-five thousand dollars.

Article 5. The names and places of residence of the persons forming this association for incorporation are Charles F. Kindred, Frank B. Thompson, Gustavus S. Fernald, Wallace J. Bain and Charles E. Taylor, all of Brainerd, Minnesota.

Article 6. The names of the first board of directors are Charles F. Kindred, Frank B. Thompson, Gustavus S. Fernald, Wallace J. Bain and Charles E. Taylor. The government of said corporation and the management of its affairs shall be vested in a board of five directors who shall be elected annually by the stockholders and from their number. The officers of this corporation shall be a president, a secretary, and a treasurer who shall be elected by the directors and from their number. Officers and directors shall continue to act as such until their successors are elected. Vacancies in the board of directors may be filled at any meeting of the stockholders called for that purpose.

Article 7. The number of shares of the capital stock of said corporation shall be one thousand and the amount thereof shall be ONE HUNDRED DOLLARS EACH.

In witness whereof we have hereunto set our hands and seals this 22nd day of July, A. D., 1886.

Charles F. Kindred, (Seal).
Frank B. Thompson, (Seal).
Gustavus S. Fernald, (Seal).
Wallace J. Bain, (Seal).
Charles E. Taylor, (Seal).

Witnesses:

O. H. Havill,
C. D. Johnson.

ARTICLES OF INCORPORATION OF THE TOWER AND SOUDAN STREET RAILWAY COMPANY.

We, whose names are hereto subscribed hereby associate ourselves together and hereby become incorporated under and pursuant to the provisions of TITLE ONE (1), CHAPTER THIRTY-FOUR (34), of the statutes of Minnesota of the YEAR 1878 and the acts amendatory thereto and as such corporation adopt the following articles, viz:

Article 1. The name of this corporation is the Tower and Soudan Street Railway Company and the general nature of its business is the construction and operation of RAILWAYS IN THE STREETS AND HIGHWAYS of the CITY OF TOWER AND ITS SUBURBS in the county of St. Louis and state of Minnesota. The general place of business of said corporation shall be Tower, St. Louis County, Minnesota.

Article II. The time of the commencement of said corporation is the 13th day of January, 1890, and the period of its continuance is FIFTY YEARS.

Article III. The amount of capital stock of this corporation is twenty thousand ($20,000) dollars to be paid in as follows, twenty-five per cent thereof at the time of subscribing said stock and the remainder in installments from time to time as the same shall be ordered by vote of the directors.

Article IV. The highest amount of indebtedness or liability to which said corporation shall at any

time be subject is twenty thousand ($20,000) dollars.

Article V. The names and places of residence of the persons forming said corporation are as follows: Frank Barrett, Morris O. Brooks, James S. Blachaller, and G. J. Atkins, residents of Lancaster, Ohio; C. W. Boyd, a resident of Rysted, Ohio, and Fred Barrett, a resident of Tower, Minnesota.

Article VI. The names of the first board of directors of said corporation are the same as above named incorporators. The government of said corporation and the management of its affairs shall be vested in the board of directors, six in number, who shall be elected on the second Monday in January in each year. The first board of directors named above hold office until the annual meeting on the second Monday in January, A. D., 1891, and until their successors are elected.

Article VII. The number of shares in the capital stock of the corporation shall be two hundred and the amount of each share shall be ONE HUNDRED DOLLARS ($100.00).

In testimony whereof, the undersigned have hereunto set their hands and seals this 30th day of December, 1889.

Frank Barrett, (Seal).
By Fred Barrett, atty. in fact.
Morris O. Brooks, (Seal).
By Fred Barrett, atty. in fact.
James S. Blachaller, (Seal).
By Fred Barrett, atty. in fact.

G. J. Atkins, (Seal).
By Fred Barrett, atty. in fact.
C. W. Boyd, (Seal).
By Fred Barrett, atty. in fact.
Fred Barrett, (Seal).

In presence of
John L. Townley,
F. S. Subeck.

ARTICLES OF INCORPORATION OF THE MANKATO STREET RAILWAY COMPANY.

Article 1. The name of this corporation shall be "The Mankato Street Railway Company" the general nature of its business shall be to construct, equip and operate railways in the streets and highways and other grounds in the city of Mankato, and its suburbs, in the county of Blue Earth and state of Minnesota, and the principal place of transacting the business of said company shall be in the city of Mankato.

Article 2. The time of commencement of said corporation shall be on the fourteenth day of June, A. D., 1886, and the period of continuance of said corporation shall be FIFTY (50) YEARS.

Article 3. The amount of the capital stock of said corporation shall be fifty thousand (50,000) dollars and shall be paid in as follows, ten (10) per cent thereof within five (5) days from the time of subscribing for said stock, and the remainder in installments as the same shall be ordered by vote of the directors.

Article 4. The highest amount of indebtedness or liability to which said corporation shall at any time be subject shall be twenty-five thousand ($25,000) dollars.

Article 5. The names and places of residence of the persons forming such association for incorporation are as follows, to-wit: Willard M. Farr, of the city of Mankato, Minnesota; John C. Noe, of the city of Mankato, Minnesota; John A. Willard,

of the city of Mankato, Minnesota, Stephen Lamm, of the city of Mankato, Minnesota; George F. Piper, of the city of Mankato, Minnesota; G. H. Clark, of the city of Mankato, Minnesota, and John R. Jones, of the city of Mankato, Minnesota.

Article 6. The government of this corporation and the management of its affairs, shall be vested in a board of five (5) directors, who shall elect a president, secretary and treasurer, the office of secretary and treasurer may be held by the same person. The names of the first board of directors of said corporation are Willard M. Farr, John C. Noe, John A. Willard, Stephen Lamm, and George H. Clark, said directors shall hold their offices until the first annual election and until their successors are duly elected. The directors shall be elected annually by the stockholders on the second Monday in June, and they shall immediately after the election and in each year elect the other officers of the corporation.

Article 7. The board of directors have power and authority to adopt any laws for the government of this corporation not inconsistent with law or with the articles of incorporation.

Article 8. The capital stock of said corporation shall be divided into five hundred (500) shares of one hundred ($100) dollars each.

In witness whereof we have hereunto set our hands and seals, at the city of Mankato aforesaid, this fourteenth day of June, A. D. 1886.

Willard M. Farr. (Seal).

Jno. C. Noe, (Seal).

John A. Willard, (Seal).
Stephen Lamm, (Seal).
Geo. F. Piper, (Seal).
Geo. H. Clark, (Seal).
John R. Jones. (Seal).

In Presence of
J. L. Washburn,
David E. Evans.

ARTICLES OF INCORPORATION OF THE MINNEAPOLIS HORSE RAILROAD COMPANY.

Know all men by these presents that the undersigned, William S. Judd, Frederick A. Gilson, Godfrey Scheittin, Benjamin S. Bull, Dorilus Morrison and such other persons as may be hereafter associated, all of the persons named above are of the city of Minneapolis, Hennepin county and state of Minnesota, have agreed to associate and do hereby associate themselves for incorporation and become incorporated under and pursuant to the provisions of TITLE ONE OF CHAPTER THIRTY-FOUR OF THE GENERAL STATUTES OF the state of Minnesota and to that end have adopted and do hereby adopt these articles of incorporation.

Article One. The name of the corporation hereby formed is The Minneapolis Horse Rail Road Company; the general nature of its business is the building of street horse rail roads and running the same, and such other business or branches of business as is usually carried on by horse rail road companies, including the transportation of freight, and its principal place of business is the city of Minneapolis, Hennepin county, Minnesota.

Article Two. Said corporation shall commence on the thirteenth (13th) day of January, one thousand eight hundred and sixty-eight (January 13th, 1868), and shall continue for the PERIOD OF FIFTY (50) YEARS thereafter.

Article Three. The amount of capital stock of the corporation shall be two hundred and fifty thousand dollars with shares of ONE HUNDRED DOLLARS EACH and ten per cent of said amount shall be paid in at the time it is subscribed for and twenty per cent more at such time as the directors of said corporation may determine at any legally organized meeting of the board; the balance shall be paid at such times and in such installments as the stockholders may determine at any legally organized meeting thereof and no certificate of stock shall be issued until authorized by a vote of the board of directors.

Article Four. The highest amount of indebtedness to which the corporation shall at any time be subject is twenty thousand (20,000) dollars.

Article Five. The names of the persons forming such association are William S. Judd, Frederick A. Gilson, Godfrey Scheittin, Benjamin S. Bull and Dorilus Morrison, and the place of residence of each and all of said persons is the city of Minneapolis, Hennepin county, Minnesota.

Article Six. The government of the association and the management of its affairs shall be vested in a board of directors consisting of five persons (5) to be elected by the stockholders. There shall be a president, secretary and treasurer of the company who shall be elected by the board of directors and from their own number; they shall hold their offices for one year and until their successors are elected and qualified, and the president and secretary so elected shall be the president and secretary of the

board as well as of the company. The directors shall be elected on the second (2nd) Monday in January in each year and as soon as practicable after each election shall proceed to organize by the election of a president, secretary and treasurer as herein provided; the directors shall hold their offices for one year and until their successors are elected and qualified. The persons herein named and who are hereby associated as aforesaid shall constitute the first board of directors and shall continue such board until the second Monday of January, 1869, and until their successors are elected and organized.

Article Seven. The board of directors may at any time appoint a general agent or one or more agents to take charge of and manage the whole or any part of the business of the corporation with such powers general or special as in the judgment of the board of directors may be necessary or expedient. Provided that such appointment can only be made by resolutions clearly defining the powers of the agent and duly entered upon the records of the corporation and provided further that such board may at any time by resolutions so entered, revoke any such appointment and all the powers by the same conferred.

Article Eight. The stock of any stockholder who shall fail or neglect to pay any installment of stock for ninety (90) days after such installment shall be due, may be sold under such regulations as the by-laws of the corporation shall prescribe and the proceeds of such sale shall be applied to the ex-

penses of such sale and the amount of such unpaid installment, and the balance (if any) shall be paid to such delinquent stockholder who shall thereupon forfeit all right or claim in and to the stock so sold.

In testimony whereof, we have hereunto subscribed our names and affixed our seals at the said city of Minneapolis, Minnesota, this sixth day ot December, A. D., one thousand eight hundred and sixty-seven.

William S. Judd, (Seal).
Frederick A. Gilson, (Seal).
G. Scheittin, (Seal).
Benjamin S. Bull, (Seal).
Dorilus Morrison, (Seal).

ARTICLES OF INCORPORATION OF THE WINONA CITY RAILWAY COMPANY.

Article 1. The name of this corporation shall be the Winona City Railway Company, the general nature of its business shall be to construct, equip and operate railways in the streets and highways and other grounds in the city of Winona, and its suburbs in the county of Winona, state of Minnesota, and the principal place of transacting the business of said company shall be in the said city of Winona.

Article II. The time of commencement of said corporation shall be the eleventh day of June, A. D. 1883, and the period of continuance of said corporation shall be FIFTY (50) YEARS.

Article III. The amount of the capital stock of said corporation shall be fifty thousand dollars ($50,000) and shall be paid in as follows, ten (10) per cent thereof within five (5) days from the time of subscribing for said stock and the remainder in installments as the same shall be ordered by vote of the directors.

Article IV. The highest amount of indebtedness or liability to which said corporation shall at any time be subject shall be twenty-five thousand dollars ($25,000).

Article V. The names and places of residence of the persons forming such association for incorporation are as follows:

T. T. Hayden, residence Winona, Minn.
John A. Mathews, " " "
Royal D. Cone, " " "
C. H. Porter, " " "
Charles Horton, " " "

Article VI. The names of the first board of directors of said corporation are T. T. Hayden, John A. Matthews, Royal B. Cone, C. H. Porter and Charles Horton. Said directors shall hold their offices until the first annual election and until their successors are duly elected. The government of this corporation and the management of its affairs shall be vested in a board of seven (7) directors who shall elect a president, vice president, secretary and treasurer. The office of secretary and treasurer may be held by the same person. The directors shall be elected annually by the stockholders on the second Monday in June and they shall immediately after their election and in each year elect the other officers of the corporation.

Article VII. The board of directors shall have power and authority to adopt any by-laws for the government of this corporation not inconsistent with law or with the articles of incorporation.

Article VIII. The capital stock of said corporation shall be divided into five hundred (500) shares of one hundred dollars ($100) each.

In witness whereof, we have hereunto set our hands and seals, at the city of Winona, in the state of Minnesota, this twenty-fifth day of May, A. D., 1883.

T. T. Hayden, (Seal).
Jos. A. Mathews, (Seal).
Royal B. Cone, (Seal).
C. H. Porter, (Seal).
Chas. Horton, (Seal).

In presence of
Thomas Wilson,
W. A. Allen.

ARTICLES OF INCORPORATION OF THE NORTHWESTERN TELEPHONE EXCHANGE COMPANY.

First. The name of the corporation hereby organized is "the Northwesern Telephone Exchange Company." The general nature of the business to be transacted by said corporation is the erection and maintenance and operation of a system of telegraph lines and telephones in the cities of Minneapolis and Saint Paul in the state of Minnesota, and between said cities and in other cities in said state. The principal place of transacting the business of said corporation is in the cities of Saint Paul and Minneapolis, Minnesota.

Second. The time of commencement of said corporation is the 10th day of December, A. D., 1878, and the period of its continuance is FIFTY YEARS.

Third. The amount of the capital stock of said corporation is ten thousand dollars to be paid in cash installments as the same may be ordered by the board of directors of said corporation, but said installments shall not exceed twenty-five per cent per month.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject is one thousand dollars.

Fifth. The names and places of residence of the persons forming this association for incorporation are Richard H. Hankinson, John Watson, Leolin M. Towne and Frederick Hocker, all of the city of

Minneapolis in the state of Minnesota, and Frank B. Jilson, of the city of Saint Paul in said state.

Sixth. The names of the board of directors of said corporation are Richard H. Hankinson, John Watson, Leolin M. Towne and Frank B. Jilson. The government of said corporation and the management of its affairs shall be vested in the board of directors who shall be elected annually on the first Monday in March of each year.

Seventh. The number and amount of shares in the capital stock of said corporation are two hundred (200) shares of fifty dollars each.

Witness our hands and seals this 10th day of December, A. D., 1878.

Richard H. Hankinson, (Seal).
John Watson, (Seal).
Leolin M. Towne, (Seal).
Frank B. Jilson, (Seal).
Frederick Hooker, (Seal).

W. A. Miller,
Signed and sealed.
In presence of
W. A. Miller,
C. B. Howe,
W. A. Miller.

ARTICLES OF INCORPORATION OF THE LYNDALE RAILWAY COMPANY.

Article I.

The name of this corporation shall be the Lyndale Railway Company, and the general nature of the business of this corporation shall be the surveying, locating, owning, constructing, maintaining and operating a railway and telegraph line with all necessary warehouses, side-tracks, shops and stations and other convenient appurtenances to said railway from a point within the City Limits of the City of Minneapolis to at or near Lake Calhoun in Hennepin County, Minnesota.

The principal place of transacting the business of this corporation shall be the City of Minneapolis, Minnesota.

Article 2.

The time of commencement of this corporation shall be the first day of July, 1878, and the period of its continuance shall be one hundred years.

Article 3.

The capital stock of this corporation shall be one hundred thousand dollars and the same shall be divided into shares of fifty dollars each and shall be paid in sums not to exceed ten per cent in any one month as may be called for by said board of directors.

ARTICLE 4.

The highest amount of indebtedness or liability of this corporation shall not at any time exceed fifty thousand dollars.

ARTICLE 5.

The names and places of residence of the persons forming this association for the purpose of incorporation are:

William McCrory, of Columbus, Ohio.
William B. Hawkes, of Columbus, Ohio.
Samuel E. Neiler, of Minneapolis, Minnesota.
Robert S. Innes, of Minneapolis, Minnesota.
Judson N. Cross, of Minneapolis, Minnesota.

ARTICLE 6.

The management and government of this corporation shall be vested in a Board of Three directors who shall be elected by the stockholders from among this number on the second Thursday of June of each year after 1878, and the officers shall be a President, Secretary and Treasurer, who shall be elected at the first meeting of the board of directors by said board after the annual election.

The names of the first board of directors are:

William McCrory, Robert S. Innes, and Judson N. Cross and William McCrory shall be President, Robert S. Innes shall be Secretary and Samuel E. Neiler shall be Treasurer till the second Thursday in June, 1879, or till their successors shall be duly chosen and qualified.

Any vacancies which may occur in the officers or board of directors may be filled at any meeting called for that purpose, and any vacancy which may occur in the Board of Directors may be filled by the remaining members thereof until the next annual meeting of the said stockholders.

In witness whereof we have hereunto signed our names this 19th day of June, 1878.

Wm. McCrory,
W. B. Hawkes,
S. E. Neiler,
Robert S. Innes,
Judson N. Cross.

In presence of
Henry G. Hicks,
Philip Wales.

ARTICLES OF THE MINNEAPOLIS, LYNDALE AND MINNETONKA RAILWAY COMPANY.

(Being the amended articles of the Lyndale Railway Company.)

Know all men by these presents that whereas in the opinion of the directors of the Lyndale Railway Company, a corporation heretofore created and incorporated under the provisions of the general laws of the State of Minnesota by the adoption, filing, publication and recording of articles of incorporation by the corporators thereof, said Lyndale Railway Company requires an increased amount of capital stock and other modifications of their articles of association, and whereas at a duly called meeting of the stockholders of said corporation held at the principal office of said corporation in the City of Minneapolis, in said State, on the 8th day of February, A. D., 1881, at which meeting each and all of the holders of said stock were present in person or by proxy and voted; said holders of said stock unanmously resolved to authorize the directors of said corporation to adopt and file in the office of the Secretary of State new articles altering, modifying and changing the original articles numbered 1, 3, 4 and 6 of the articles of incorporation of said corporation as below adopted; and whereas at a regular meeting of the directors of said corporation duly called and duly held after said meeting of said stockholders at the same place and on the same day said directors did by a resolution duly and unani-

mously passed adopt the following new articles numbered 1, 3, 4 and 6 in lieu of and altering, modifying and changing original articles numbered 1, 3, 4 and 6 of said articles of incorporation as follows, to-wit:

ARTICLE 1.

The name of this corporation shall be the Minneapolis, Lyndale & Minnetonka Railway Company and the general nature of its business is to survey, locate, construct, own, lease, purchase, maintain and operate a railway, telegraph and telephone line or lines with all necessary or convenient warehouses, side-tracks, shops, stations, wharves, landings and other convenient appurtenances to said telegraph and telephone lines from a point within or a point nearby outside the city limits of the city of Minneapolis, in the State of Minnesota, to at or near Lake Minnetonka, in said State via Lyndale, Lake Calhoun and Lake Harriet, in Hennepin County, in said state, with a branch of said lines to the Falls of Minnehaha and Fort Snelling in said County. The principal place of transacting the business of this corporation shall be at the city of Minneapolis, Minnesota.

ARTICLE 3.

The capital stock of this corporation shall be increased to one million dollars and the same shall be divided into ten thousand shares of one hundred dollars each and shall be paid in in such sums and at such times as may be called for by the Board of

Directors, not to exceed ten per cent thereof in any one month.

ARTICLE 4.

The highest amount of indebtedness or liability to which this corporation shall be subject at any time shall be seven hundred and fifty thousand dollars.

ARTICLE 6.

After the next annual meeting of the stockholders the management and government of the affairs of this corporation shall be vested in a board of five directors who shall be elected by the stockholders of this corporation at their annual meeting which shall be held at the principal office of said corporation in said City of Minneapolis on the first Tuesday in August of each year, and the officers of this corporation shall be a President, Vice-President, Secretary and Treasurer, who shall be elected annually by the Board of Directors at their first regular meeting after their election, but the present directors and officers shall be and remain the directors and officers of said corporation until such new election of Directors at the annual meeting of said stockholders in A. D. 1881, and the election of officers by the new Board of Directors then elected.

All such directors and officers shall hold their respective offices until their successors shall be duly elected or appointed and duly qualified. Any vacancies which may occur in the Board of Directors or officers may be filled by the Board of Directors

or the remaining directors at any meeting called for that purpose, which such appointed Directors or officers shall hold their offices until the next annual election thereof. And whereas said corporation has resolved by said action of its stockholders and Board of Directors to so alter, modify and change its said articles 1, 3, 4 and 6, of its said original articles of incorporation. Now, therefore, this is to certify to whom it may concern, that said original articles 1, 3, 4 and 6 of the original articles of incorporation of this corporation, have been altered, modified and changed in such manner that the new articles 1, 3, 4 and 6, above set forth have been adopted in lieu of said original articles 1, 3, 4 and 6 above referred to, and ordered filed in the office of said Secretary of State of the State of Minnesota, by said directors, on the authority so given them by said stockholders and on said resolution of said corporation so expressed. In witness whereof the President, Secretary and a majority of said directors, who are also a majority of said stockholders and holding a majority of the stock in said capital stock have hereunto set their names and seals, and said President and Secretary have caused the seal of said corporation to be affixed hereto, all on this eighth (8th) day of February, A. D. 1881.

WM. MCCRORY, (Seal)
as such President.

ALBERT L. SCOTT, (Seal)
as such Secretary.

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WM. MCCRORY. (Seal)
JUDSON N. CROSS, (Seal)
as such Directors.

In presence of
E. K. FAIRCHILD.
JOHN S. HEATON.

ARTICLES OF INCORPORATION

OF THE

ST PAUL AND ST. ANTHONY RAILROAD COMPANY.

CHAPTER LXV, SPECIAL LAWS 1853.

AN ACT TO INCORPORATE THE ST. PAUL & ST. ANTHONY RAILROAD COMPANY.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

That James W. Davis, Eli Kinney, Luke P. N. Smith, George Johnson, John Rollins, James Wells, C. Carli, Emanuel Case, William P. Murray, William L. Larned, R. P. Russell, R. M. Spencer, Alfred E. Ames and Edmund Rice, and those who may hereafter become stockholders in the manner hereinafter prescribed, their successors and assigns, be, and they are hereby created a body corporate by the name and style of the St. Paul & St. Anthony Railroad Company, with perpetual succession, and by that name and style, shall be, and are hereby made capable in law to have, purchase, receive, possess, sell, convey and enjoy, real and personal estate, and retain to them, their successors and assigns, all such lands, tenements and hereditaments, as shall be requisite and necessary for their accommodation and convenience in the transaction of their business; to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended in courts of record and elsewhere,

and also to have, make and use a common seal, and to alter, renew or change the same at their pleasure.

Sec. 2. That the said corporation is hereby vested with the right and authority to construct a railroad commencing in or near the town of St. Paul, in the County of Ramsey, and thence by such route as the directors may select, to or near the town of St. Anthony, in the County of Ramsey, as the directors may hereafter determine.

Sec. 3. That the capital stock of said company shall be four hundred thousand dollars, and shall be divided into shares of one hundred dollars each.

Sec. 4. That the above named persons, or any two of them, are hereby authorized to order books for receiving subscriptions to the capital stock of said company, to be opened at such time or times, in the town of St. Paul, and at such place or places as may be deemed expedient under the direction of not less than two of the above named persons, having given not less than ten days' notice in a newspaper published in the county where books of subscription are to be opened, of the time and place of opening of said books, and as soon as five hundred shares of stock shall be subscribed, they shall give a like notice for a meeting of stockholders, to meet at such time and place as they may designate, to choose by ballot five directors who shall continue in office for the term of one year, and until their successors are elected and qualified, and at all elections for directors, each share of the capital stock shall entitle the owner thereof to one vote, and may either be voted in person or by lawful proxies; two

competent persons shall be selected inspectors of such elections, and they shall forthwith certify under their hands who are elected directors, and a new election shall be held annually at such time and place as the stockholders or directors may appoint, or as the by-laws of the corporation may require, and the directors shall, as soon as convenient, elect from their own number a president and a treasurer of the corporation.

Sec. 5. That upon every subscription there shall be paid at the time of subscribing, to the persons authorized to open books, the sum of twenty dollars, and the residue thereof shall be paid in such installments and at such times as may be required by the president and directors of said company, to the treasurer thereof, and the said directors are authorized to take and receive from such persons as shall purchase such stock as aforesaid, such bonds or notes for the residue of the purchase money of said stock as they may deem expedient.

Sec. 6. That if said company shall not organize within one year from the date of the passage of this act, and have the road completed in three years from the organization of said company, then this act shall be void.

Sec. 7. That the directors shall have power to determine and construct the number and kind of tracks, turnouts, branches, carriages, conveyances, storehouses, depots, engine shops, foundries and such other fixtures and machinery, and also to prescribe the mode of transportation and also to have power to construct a double track railroad if they deem it expedient.

Sec. 8. That said company shall have the right to enter upon any land, to survey, locate, construct and lay down said road, and to take any materials necessary to the construction and repair of said work, and whenever any land or materials shall be taken for the construction of said work, and the same shall not be given or granted to said company, and the owners thereof do not agree with said company as to the compensation to be paid therefor; or in case the owner or owners are under any disability to contract or absent from the territory application may be made by said company to any judge of the district court, or any two justices of the peace in said county in which such lands and materials may be; and thereupon it shall be the duty of said judge or said justices of the peace, to issue his or their warrant to the marshal or to the sheriff of said county, commanding him to summon three disinterested freeholders of said county to arbitrate upon the compensation to be awarded to such person or persons, who shall be sworn and paid as arbitrators in other cases, and they or a majority of them, shall award as arbitrators between the parties, and render copies of their award to each of the parties in writing, from which award either party may appeal within ten days thereafter, by giving bond and security to the opposite party, in such sum as the court may prescribe, to the district court for the said county in which said land or materials are situated, which appeal shall be proceeded in as in other cases of appeal, and in all cases where compensation shall in any manner be claimed, it shall be the duty of the arbitrators and the court

to estimate and set off any advantage which the location and construction of said road may be to the claimant; and said company shall have the right to retain, own, hold and possess said materials, and to the use and occupation of said lands as fully and absolutely as if the same had been granted and conveyed to said company by deed. *Provided,* That before said company shall enter upon any land for the purpose of constructing the said road, or for the purpose of procuring materials for the same, they shall pay or secure to the owner of such lands or materials, payment for the same, as may be agreed or awarded by the provisions of this section.

Sec. 9. That if it shall be necessary in the selection of the route or construction of the road, to connect the same with, or use any other road, street or bridge made or erected by any company or persons incorporated or authorized by any law of this territory, it shall be lawful for said company, and it is hereby authorized to contract and agree with any such corporations or persons for the right to use such road, street or bridge, or for the transfer of any of the corporate or other rights, or privileges of such corporation or persons, to the said president and directors of this corporation; and all such other corporations and persons incorporated by or acting under the laws of this territory, are hereby authorized to make such an agreement, contract or transfer by and through the agency of their corporate officers, or such other persons as by any law of this territory, are entrusted with the direction and management of such road, street or bridge; and

every transfer made in pursuance to the power hereby granted, when executed by the several parties under their respective seals, or otherwise legally authenticated, shall vest in this corporation all the rights and privileges vested in said corporations or persons, as shall be specified in the contract and agreement above referred to.

Sec. 10. Whenever it shall be necessary for the construction of the railroad to intersect or cross any stream of water or watercourse, laying in or across the route of said road, it shall be lawful for the corporation to construct the said railroad across or upon the same, but the corporation shall restore the stream or watercourse thus intersected, to its former style, or place it in such a condition as not materially to impair its former usefulness; and in case the interest of said company shall require them to occupy or change any road or highway, said company shall so turn or change such road or highway and construct the same in as good a state as to render the same as useful and convenient as the former road or highway; and if said company, after having selected a route for said railroad, find any obstacles in continuing said location, either by the difficulty of constructing or procuring the right of way, at a reasonable cost, or when a better or cheaper route can be had, it shall have the right to vary the route and change the location.

Sec. 11. That said company may prescribe, demand and receive from all persons using or traveling upon said road, or for the transportation of property, such rates of compensation as the said

company may think reasonable, which rates prescribed by said company shall be posted up in suitable places in each of their depots.

Sec. 12. That at the regular annual meeting of the stockholders of said Company, it shall be the duty of the president and treasurer in the office the year previous, to exhibit a clear and distinct statement of the affairs of the company to the stockholders, and the president and directors shall annually or semi-annually declare and make a dividend of the net profits arising from the revenues of the company, deducting the necessary current and probable contingent expenses, and they shall divide the same among the stockholders in proportion to their respective shares.

Sec. 13. That every president, director and treasurer of said company, before he acts as such, shall swear or affirm, as the case may be, that he will well and truly discharge the duties of his said office to the best of his skill and ability; and the arbitrators authorized by the eighth section of this act, before they proceed to estimate damages, shall severally take an oath or affirmation faithfully, impartially and honestly to discharge their duty as such arbitrators; and the said appraisers shall each receive two dollars per day for each day they may be necessarily employed, which shall be paid by said company.

Sec. 14. That the president and directors, or a majority of them may appoint all such officers, engineers, agents and servants, whatsover, as they may deem necessary for the transaction of the business

of the company, and may remove any of them at their pleasure; that they or a majority of them, shall have the power to determine by contract, the compensation of the engineers, officers, agents or servants, in the employ of said company, and to determine by their by-laws the manner of adjusting and settling all accounts against the said company; and also the form of the certificate of stock; the manner and evidence of transfers of stock in said company; and they or a majority of them shall have the power to pass by-laws, which they may deem necessary and proper for exercising all the powers vested in the company hereby incorporated, and for carrying the objects of this act into effect. *Provided, only* that said by-laws shall not be contrary to the laws of this territory or of the United States.

Sec. 15. That if any person shall willfully, by any means whatsoever, injure, impair, or destroy any part of said railroad, in process of construction, or constructed by said company under this act, or any of the necessary work, buildings, cars, engine-houses, foundries or machinery, of the said Company, such person or persons so offending, shall each of them for every such offense, forfeit and pay to the said Company three-fold the damages, which may be recovered in the name of the said Company by civil action with costs of suit in any court having cognizance thereof, and shall also be subject to an indictment in any court having jurisdiction of crimes and offenses; and such person may be committed, and upon conviction of such offense, shall be punished by fine not exceeding five hun-

dred dollars, and imprisonment at the discretion of the court.

Sec. 16. If any installment remain unpaid for ninety days after the time for payment has elapsed, the Directors may order them collected in the name of the Company by suit, or may sell the stock at public auction for the installments then due, giving twenty days notice of the time and place of sale, by advertisement in some newspaper of general circulation in the county where such sale is to be made, and the residue of the money arising from such sale after paying such installments and costs shall be paid over to the former owner.

Sec. 17. That the said Directors are hereby authorized to borrow any amount of money not exceeding two hundred thousand dollars, upon the faith and credit of said Company, upon such terms and rates of interest as they may deem proper, and for that purpose they are authorized to issue their bonds in convenient amounts of not less than one hundred dollars each, and to make the principal and interest payable at such times and places as may be agreed upon between the parties, and to mortgage the road, franchises, equipments, buildings, engine shops, machinery and fixtures of every kind whatsoever, for the payment of the same.

Sec. 18. This act shall take effect from and after its passage.

Sec. 19. The legislature may at any time alter, amend or repeal this act.

Approved March 2, 1853.

CHAPTER XXXIII, LAWS OF 1856.

AN ACT TO AMEND AN ACT ENTITLED AN ACT TO INCORPORATE THE ST. PAUL AND SAINT ANTHONY RAILROAD COMPANY.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Section 1. That the act entitled An act to incorporate the Saint Paul and Saint Anthony Railroad Company, approved March 2, 1853, be and the same is hereby revived and declared to be in full force and effect, except so much thereof as may be hereinafter altered or amended.

Sec. 2. The first section of said act is hereby amended by adding the names of Adna P. Balch, Alexander Ramsey, Henry A. Swift and Daniel S. Balch to the incorporators designated in the original act.

Sec. 3. The second section of said act shall be amended in the fourth line, by striking out the words "to or near" and inserting in their stead, the words "to such point."

Sec. 4. The sixth section is hereby amended so as to extend the time therein for the organization of said company to three months from the date of the passage of this act.

Sec. 5. This act shall take effect from and after its passage.

CHARLES GARDNER,
Speaker of the House of Representatives.
JOHN B. BRISBIN,
President of the Council.

Approved March 1st, 1856.
W. A. GORMAN.

CHAPTER VI.

SPECIAL LAWS FOR 1868.

AN ACT TO REVIVE AND CONTINUE AN ACT, AND THE CORPORATION CREATED BY SAID ACT ENTITLED "AN ACT TO INCORPORATE THE ST. PAUL & ST. ANTHONY RAILROAD COMPANY, APPROVED MARCH SECOND, ONE THOUSAND EIGHT HUNDRED AND FIFTY-THREE, AND TO AMEND THE SAID ACT."

Be it enacted by the Legislature of the State of Minnesota:

That the act entitled "An act to incorporate the St. Paul and St. Anthony Railroad Company," approved March Second, One Thousand Eight Hundred and Fifty-three, and the corporation thereby created, be and the same are hereby revived and continued, and said act is hereby amended so that the same shall read as follows:

Section 1. George L. Becker, W. H. Temple, Lafayette Emmett, Eugene Underwood, John M. Gilman, De Witt C. Jones, Charles H. Lineau, P. F. McQuillan, Louis Roberts and Parker Paine, and their associates, successors and assigns be and they are hereby created a body corporate, by the name and style of "The St. Paul Street Railway Company," with perpetual succession, and by that name and style shall be and are hereby made capable in law to have, purchase, receive, possess, hold, use, enjoy, bargain, sell and convey real and personal estate and all kinds of property, and by that name to contract and be contracted with, sue and be sued,

implead and be impleaded, answer and be answered unto, defend and be defended, in all courts of record or elsewhere, and also to have, make and use a common seal, and to alter, renew or change the same at their pleasure.

Sec. 2. The said corporation is hereby authorized and vested with the right, power and full authority to lay out, construct, operate, maintain and use a railway, with all the necessary or convenient tracks, side-tracks, turnouts, switches and other appurtenances, from the city of St. Paul, in the county of Ramsey, to the western line of said county of Ramsey, in the direction of the city of St. Anthony, in the county of Hennepin, and also with the full right, permission, privilege, power and authority to lay out, establish, construct, maintain, use and operate a line of railway with single or double tracks, switches, side-tracks, turn-outs and all other necessary or convenient fixtures and appurtenances in, upon and along any and all of the streets and bridges, within the present or future limits of said city of St. Paul, in the manner, for the periods, and upon the terms and conditions, and subject to all the conditions of a certain ordinance of said city of St. Paul, entitled "An ordinance to authorize the construction and operation of rail carriage-ways in the streets of St. Paul," passed by the Mayor and Common Council of said city on the Seventeenth day of December, A. D., One Thousand Eight Hundred and Sixty-Seven, approved by the mayor thereof on the Twenty-first day of December, A. D., One Thousand Eight Hundred and

Sixty-seven and purporting to grant to the several persons herein named as incorporators, their associates, successors, heirs, executors, administrators and assigns, the right and authority to construct, use and operate lines of railway in, upon and along the streets and bridges of said city upon certain terms and conditions therein prescribed. It being intended hereby fully to ratify and confirm said ordinance, and the same is hereby in all respects ratified and confirmed as fully and completely as if said ordinance were here repeated and enacted at length, and the said corporation is also hereby vested with the full right, power and authority at any time hereafter to extend either or any of said lines, with single or double tracks, and such side tracks, turnouts, switches and other fixtures and appurtenances as may be deemed convenient in, over, upon and along any and all public highways there or now in existence outside of the limits of said city of St. Paul, to any point or points in the county of Ramsey; and in case said corporation shall wish to diverge or depart from such highway or highways, with any line or lines of its said railway it shall have the right so to do and to enter upon any land for that purpose and to survey, locate and construct its road thereon and may take therefrom any material necessary to the construction or the repair thereof, and should the owner or owners of said land and said corporation be unable to agree upon the value of said land or material, or both, or the damages thereto, such value or damages or both, or as the case may be, shall be ascertained and paid

in accordance with the provisions of the general law of the State for the condemnation and appropriation of private property for railway purposes.

Sec. 3. The capital stock of said Company shall be three hundred thousand dollars and shall be divided into shares of one hundred dollars each; but said Company may at any time and from time to time, by resolutions, increase its capital stock to such an amount as may be deemed advisable to carry out and accomplish the objects of said Company. Said Company may open books for subscription to the capital stock thereof at such time or times and places and in such manner and upon such terms as it may deem proper, and may also issue and dispose of its stock as full paid stock, upon such terms as may be deemed advisable in the accomplishment of its said undertaking.

Sec. 4. The business and affairs of said Company shall be managed by a Board of Directors consisting of not less than five nor more than eleven, as may be determined by the by-laws of the Company. The Directors shall be elected annually by the stockholders of the Company at such time and in such manner as may be prescribed by the by-laws, and shall hold until their successors are duly elected. A majority of the Directors shall constitute a quorum for the transaction of business, and any vacancy occurring in the board may be filled by the board until the next regular election. The Directors may make by-laws, rules and regulations for the Company and by by-laws or otherwise appoint or employ, and prescribe the duties, powers and compen-

sation of such officers, agents and servants, as they may deem advisable in carrying on and managing the business of said Company. The corporators hereinbefore named shall constitute the Board of Directors of said Company until their successors are duly elected.

Sec. 5. The said Company by its Directors, may borrow money upon the faith and credit of said Company upon such rates of interest as may be agreed upon, and may issue the bonds or other evidence of debt of the Company with or without interest coupons attached, in such sums and payable at such time and place as may be agreed upon, and to secure the payment thereof may mortgage its road, rights, franchises, and any and all other property of the Company present and future.

Sec. 6. This act shall take effect and be in force from and after its passage.

Approved March 4, 1868.

CHAPTER CXII.

SPECIAL LAWS FOR 1872.

AN ACT TO REVIVE, CONTINUE AND AMEND AN ACT ENTITLED, "AN ACT TO REVIVE AND CONTINUE AN ACT AND THE CORPORATION CREATED BY SAID ACT, ENTITLED 'AN ACT TO INCORPORATE THE ST. PAUL & ST. ANTHONY RAILROAD COMPANY,' APPROVED MARCH SECOND, ONE THOUSAND EIGHT HUNDRED AND FIFTY-THREE, AND TO AMEND THE SAID ACT," APPROVED MARCH 4, 1868.

Be it enacted by the Legislature of the State of Minnesota:

That section one (1) of "An act to revive and continue an act and the corporation created by said Act entitled 'An act to incorporate the St. Paul and St. Anthony Railroad Company, approved March Second, One Thousand Eight Hundred and Fifty-three,' and to amend the said act approved March 4, 1868," be and the same is hereby amended so as to read as follows:

Section 1. That George L. Becker, Lafayette Emmett, Eugene Underwood, John M. Gilman, Charles H. Lineau, P. F. McQuillan, Louis Roberts, Parker Paine, J. C. Burbank, J. L. Merriam, William Dawson, E. F. Drake, H. L. Carver, Horace Thompson, William Lee, William F. Davidson, A. H. Wilder, Peter Berkey, George Culver, James M. Winslow, Bartlett Presley, A. Vance Brown, J. A. Lusk, W. S. Wright, R. J. Baldwin, John Potts Brown, John S. Walker, Paris Gibson, O. C. Merri-

man, James A. Lovejoy, John S. Pillsbury, John B. Gilfillan, John Dudley, Richard Chute, C. H. Pettit, and their associates, successors and assigns, be and they are hereby created a body corporate, by the name and style of "The St. Paul Street Railway Company," with perpetual succession, and by that name and style shall be and are hereby made capable in law to have, purchase, receive, possess, hold, use, enjoy, bargain, sell and convey real and personal estate and all kinds of property, necessary to the proper management of the business of said Railway Company, and by that name to contract (and be contracted) with, sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended in all courts of record or elsewhere, and also to have, make and use a common seal, and to alter, renew or change the same at their pleasure.

Sec. 2. Section two (2) of the said act is hereby amended by inserting after the words "in the direction of the city of St. Anthony," the words, "or Minneapolis," in the seventh line of said section two (2) as published; and also by striking out the words, "An ordinance to authorize the construction and operation of rail carriage-ways in the city of St. Paul," passed by the Mayor and Common Council of said city on the Seventeenth day of December, A. D., One Thousand Eight Hundred and Sixty-seven, approved by the mayor thereof on the Twenty-first day of December, A. D., One Thousand Eight Hundred and Sixty-seven, and purporting to grant to the several persons herein named as in-

corporators," and inserting in lieu and in place thereof, the words following, viz.: "An ordinance to authorize the construction and operation of horse railways in certain streets in St. Paul," as adopted by the common council of said city on the second day of January, A. D., 1872, and approved and signed by the mayor thereof on the 8th day of January, A. D., 1872, and purporting to grant to the several persons therein named, as incorporators.

Sec. 3. All parts and portions of said act above referred to as hereby amended, are revived and continued in full force and effect, anything in said act contained to the contrary nothwithstanding. When said railroad shall extend beyond the limits of the city of St. Paul, it shall be in the most direct line to the State University, and shall be built to that point with all reasonable dispatch; anything in this act or the acts of which this is an amendment to the contrary notwithstanding.

Sec. 4. This act shall take effect and be in force from and after its passage.

Approved February 29, 1872.

ORGANIZATION OF THE ST. PAUL CITY RAILWAY COMPANY.

Statement of the Saint Paul City Railway Company made under and pursuant to an act of the legislature of the State of Minnesota, approved March 6th, 1876, entitled "An act to amend title 1, chapter 34, of the general statutes relating to corporations.

Whereas, in pursuance of a judgment of the District Court of the State of Minnesota, in and for the County of Ramsey, rendered on the twenty-eighth day of April, 1877, in an action wherein Thos. Cochran, Jr., trustee (substituted in place of John S. Prince, resigned), is plaintiff, and the Saint Paul Street Railway Company and Lafayette Shaw were defendants, brought to foreclose a certain mortgage or deed of trust, with a supplemented deed thereto, executed by said company, of the railway property and franchises of said company in said judgment set forth and by proper proceedings on said judgment the said mortgaged premises were, on the twenty-eighth day of September, 1877, sold by the sheriff of said County of Ramsey, to the said Thomas Cochran, Jr., trustee, as aforesaid. And whereas, on the seventeenth day of October, 1877, the said sheriff duly executed and delivered to the said Thomas Cochran, Jr., trustee, a certificate of said sale, dated the day and year last mentioned, wherein the said Thomas Cochran, Jr., trustee, is duly named as purchaser aforesaid.

And whereas: The said Thomas Cochran, Jr., being desirous of forming a new organization pursuant to the said act of the legislature of the State of Minnesota, approved March 6th, 1876, entitled, "An act to amend title I, of chapter 34, of the general statutes relating to corporations," gave due notice by publication as required by said act of the legislature, of a meeting for the purpose of forming such new organization as provided by said statute.

And whereas: In accordance with said statute, and in pursuance of said notice, a meeting thereon was duly held on the thirtieth day of October, A. D., eighteen hundred and seventy-seven at the City of Saint Paul, in the State of Minnesota, whereat a corporate name for the proposed new organization was adopted and a board of seven directors were duly elected therefor, and said board of directors thereon duly convened and organized, and duly elected a president, secretary and treasurer, and adopted a corporate seal of and for said new organization, whereby the said new organization became and was complete, and became and was a body corporate under the name so adopted as aforesaid and hereinafter stated, and by virtue of said statute. Now, therefore, this statement witnesseth to all whom it may concern:

First—That the date of said new organization and body corporate formed as aforesaid, is the thirtieth day of October, A. D. eighteen hundred and seventy-seven.

Second—That the corporate name of said new organization and body corporate adopted by it, is "The Saint Paul City Railway Company."

Third—That the amount of its capital stock, being common stock, is three hundred thousand dollars, and is unissued.

Fourth—That the names of its general officers so chosen are as follows, to-wit: The name of its president is Alfred H. Porter, of the City of New York. The name of its secretary is William G. Dominick, of the City of New York, and the name of its treasurer is James R. Walsh, of the said City of Saint Paul.

Fifth—That its directors are seven in number, and their names are as follows, to-wit: The said Alfred H. Porter, the said William G. Dominick, the said James R. Walsh, William H. Phillips, of the City of New York, Henry Horn, of the said City of Saint Paul, Frank F. Mix, of said City of Saint Paul and Theodore E. B. Case, of said City of St. Paul, so chosen at said meeting, all of which the said new organization, to-wit:—the said "The Saint Paul City Railway Company," has caused to be certified by these presents under its corporate seal hereunto affixed and to be attested by its president and secretary this thirtieth day of October, A. D., eighteen hundred and seventy-seven.

ALFRED H. PORTER, (Seal.)
President of the St. Paul City Railway Co.

WILLIAM G. DOMINICK, (Seal.)
Secretary of the St. Paul City Railway Co.

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Supreme Court of the United States

OCTOBER TERM, 1909

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

NO. 46.

THE CITY OF MINNEAPOLIS,
Appellant.

vs.

MINNEAPOLIS STREET RAILWAY COMPANY,
Appellee.

BRIEF OF APPELLEE.

M. B. KOON,
Of Counsel for Appellee.

M. D. MUNN,
Solicitor for Appellee.



Supreme Court of the United States

OCTOBER TERM, 1909.

NO. 46.

THE CITY OF MINNEAPOLIS,

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vs.

MINNEAPOLIS STREET RAILWAY COMPANY,

Appellee.

BRIEF OF APPELLEE.

For convenience and brevity in this case, we shall refer to the Appellant as "the City," and to the Appellee as "the Company."

This cause came on to be heard on an order to show cause why a temporary injunction should not be issued, and was heard on the Bill, Answer and certain Stipulations between the parties. The principal question involved being the right of the Company to charge a five-cent fare, for the carriage of passengers on its lines of street railway in the City of Minneapolis.

It is alleged by the Company, and admitted by the City, that on July 9, 1875, the City duly passed an ordinance granting to the Company

> "During the term of its charter the exclusive right and privilege of constructing and operating a single or double track for a passenger railway line, with all necessary tracks for turnouts, side tracks and switches in such streets of said City as the City Council may deem suited to street railways."

Section 8 of this ordinance provides as follows:

> "Said Company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided that the charge for carrying a person, including hand baggage, from one point to another within the City limits, whether by one or more lines operated by the same Company shall not exceed five cents on any one line; provided further, that the City of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said Companies, their successors and assigns for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the City Council of said City may deem just and reasonable; provided that the City shall not reduce the passenger's fare below five cents, over any one continuous line, and what shall be considered a continuous line may be designated by the City Council of the said City; but that said Council shall not designate any such continuous line to be more than three miles in length."

(This section is modified as to the length of ride by the transfer provisions contained in the motive power ordinances hereafter referred to.)

This 1875 ordinance was duly published and accepted by the Company and is set forth in full at Folios 6 to 14 of the record.

It is supplemented by another passed by the Common Council of the City on July 3, 1878, as set forth at Folio 15 of the record; which last ordinance in no way affects or changes the right of the Company as to rate of fare to be charged; but does contain an important provision, which we shall refer to later.

Both these ordinances were ratified and confirmed and the rights and privileges therein contained legalized and granted to said Company by the Legislature of the State on March 4, 1879, as follows:

"AN ACT TO CONFIRM THE GRANT OF THE CITY OF MINNEAPOLIS TO THE MINNEAPOLIS STREET RAILWAY COMPANY.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whereas the City of Minneapolis did, by ordinance entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' passed by the City Council of said City on the ninth day of July, eighteen hundred and seventy-five, and approved by the mayor of said city on the seventeenth day of July, eighteen hundred and seventy-five, and by ordinance passed July third, eighteen hundred and seventy-eight, and amended July eight, eighteen hundred and seventy-eight, and approved July tenth, eighteen hundred and seventy-eight, grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of said city with certain rights and privileges in said ordinance particularly set forth; now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said Company.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved March 4, 1879." (See Folio 17 of record.)

The passage of these ordinances by the City and their ratification by the State are admitted at Folios 145 to 147 inclusive of the record.

The Company further alleges in its bill, that during the year 1889 the City was desirous of having the Company operate certain of its existing lines by underground cables; and also to have the Company determine whether or not electricity could be used on its lines as a motive power, and with that end in view passed certain resolutions set forth in the bill and found at Folios 19 to 27 of the record.

That subsequently the City became satisfied that electricity could be successfully used, and being desirous of having the Company change the motive power on all its lines to electricity, passed certain resolutions under which the Company was required and directed to change the motive power on all of its lines in the City to electricity. These resolutions were accepted by the Company and complied with, and are set forth in the bill from Folios 19 to 39 inclusive of the record. The passage of these resolutions is also admitted by the City at Folio 145 to 150 of the record.

Further reference to the purpose and effect of these resolutions will be made later in the brief.

In making these changes in the motive power to meet the demands of the City, the Company has expended many millions of dollars, which fact is admitted by the City.

On February 9, 1907, the City attempted to reduce the rate of fare, which the Company claims the right to charge, as provided in the ordinance of 1875, below five cents, and with that end in view passed an ordinance on the last named date, requiring the Company to sell six tickets for twenty-five cents, to any person traveling upon its lines of street railway in the City. (See Folio 49 of record.)

The Company filed its bill in this action to enjoin the publication and enforcement of this ordinance by the City. A decision was rendered by the Court below in favor of the Company. From this decision and decree entered thereon, the City has appealed to this Court.

While the City assigned several errors in the Court below, counsel for the City in their brief direct their attention to only a portion of the errors so assigned; and in this brief we shall consider only such errors as are discussed by the City and covered in the three propositions advanced by the City, before this Court on its appeal. These may be summarized as follows:

First—That notwithstanding the fact that the Company organized for and fixed the term of its charter at fifty years, the laws of the State did not authorize it to incorporate for more than thirty years; and therefore its contract rights with the City terminated on July 1st, 1903; and since that time it has had no rights in the streets of the City.

Second—Conceding that the ordinance of July 9, 1875, as ratified by the Legislature in 1879, constituted a contract between the Company and the City, under which the rate of fare could not be reduced below five cents without the Company's consent, the Company has abandoned its rights under this contract by accepting the ordinances authorizing the change in its motive power, so that now the City has full power and authority to fix any rate of fare it deems best.

Third—That if these contentions on the part of the City are not correct, then the City has reserved to itself, under section 8 of the ordinance of September 19, 1890, full power and authority to pass any ordinance it may see fit affecting the rate of fare to be charged by the Company,

as well as any other material right granted to the Company under the ordinance of July 9, 1875.

These are the three propositions advanced by the City and upon which it asks this Court to reverse the decision of the lower Court; and the assignments of error now relied upon by the City are directed to these three propositions. We will take them up in the order above named.

I.

The ordinance passed by the City on July 9, 1875, and subsequently ratified by the Legislature of the State, provides that the rights and privileges therein granted to the Company shall continue *"during the term of its charter."* The Articles of Incorporation of the Company, which are fully set forth at Folio 59 of the record, fix the term of its charter or corporate period at fifty years.

It is now claimed by the City that the Company could not incorporate for a period of fifty years, for the reason that the Laws of Minnesota did not permit it to organize for a period longer than thirty years. Thus, it becomes necessary to examine the laws of the State relative to the formation of corporations in 1873; that being the time this Company was organized.

The Statutes of Minnesota then in force relative to the formation of corporations is Chapter 34 of the Revision of 1866, and is subdivided into five titles.

Section 1 of Title 1 of said chapter provided as follows:

> "Any number of persons, not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals or slackwater navigation, upon any river or lake, and all works of internal improvement, which require the taking of private property or any easement therein."

Section 5 of said Title 1 provided:

> "That no such corporation shall be formed to continue more than *fifty years* in the first instance, but it may be renewed from time to time for periods not longer than fifty years."

The first section of Title 2 of said chapter provided as follows:

> "Any number of persons, not less than three, who shall, by articles of agreement, in writing, associate according to the provisions of this title, under any name assumed by them, for the purpose of engaging in and carrying on mining, smelting or manufacturing iron, copper or other minerals, or any kind of manufacturing, lumbering, agricultural, mechanical, chemical business, transportation or other lawful business, and who shall comply with the provisions of this title, shall, with their successors and assigns, constitute a body politic and corporate under the name assumed by them in their articles of association; provided, no company shall take a name previously assumed by any other company."

It is further provided in Title 2 that no corporation shall be formed thereunder to continue more than thirty years; and further provides that:

> "The amount of capital stock in every such corporation shall in no case be less than $10,000 nor more than $500,000 and shall be divided into shares of $50.00 each."

Both Title 1 and Title 2, so far as they relate to the questions now under consideration, are derived from the compilation of 1859, which consisted of a chronological collection of the various laws of the State, adopted prior to 1859, and is designated as Statutes of Minn. 1849-1858. Turning to this, we find that on August 12, 1858, the Legislature passed Chapter 55 of the Laws of that year, Section 1 of which reads as follows:

> "Any number of persons may associate themselves and become incorporated for the transaction of any lawful business, including the establishment of ferries, the construction of canals, *railways*, telegraphs, bridges *or other works of internal improvement;* but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided."

Section 9 of this chapter provided that:

> "Corporations for the construction of any work of internal improvement may be formed to endure *fifty years.*"

Said Chapter 55 is set forth in its entirety in the compilation of 1859, and found at page 330 of that compilation. There was already in existence in the State at that time, a law which authorized the formation of a corporation to own and operate a railroad. There was also in force in the State at the same time a law which authorized the formation and operation of "plank and turnpike road companies." These two last named corporations were authorized to exercise the power of eminent domain, and they were the only corporations so authorized to exercise that right at that time.

At the same session of the Legislature, and on the same day at which said Chapter 55 was passed, Chapter 78 was also passed. Section 1 of said Chapter 78 provided as follows:

> "Section 1. Any three or more persons desirous of forming a corporation for the purpose of carrying on any kind of manufacturing, mining, lumbering, agricultural, mechanical or chemical business, may make, sign and acknowledge before some officer authorized to take the acknowledgment of deeds, a certificate in writing, in which shall be stated the name of such corporation, and the objects for which the corporation shall be formed, the amount of the capital stock of such corporation, the term of its existence, which shall not exceed

thirty years, the number of shares of which said stock shall consist, the number of directors and their names, who shall manage the concerns of said corporation for the first year, and the names of the town and county in which the operations of said corporation are to be carried on."

In the Revision of 1866, Section 1 of said Chapter 55 of the Laws of 1858 becomes Section 1 of Title 1 of Chapter 34, so changed as to authorize the formation thereunder of all corporations to conduct or carry on *any work of internal improvement* including railroads; and the Commissioners who revised the Statutes for the year 1866, state that Section 1 of Title 1 is taken from said Chapter 55 of the Laws of 1858, enlarged and changed as above indicated.

Counsel for the City assert that Title 1 is founded on the "railroad act" as it appears in the 1859 compilation. This statement is not correct, as is clearly shown by the commissioners' notes. On the contrary, the so-called "railroad act" is moulded into Chapter 55 of the Laws of 1858, in the Revision of 1866.

Title 2 of Chapter 34 of the Revision of 1866 is taken from Chapter 24 of the Laws of 1860, as stated by the Commissioners making such revision in a note thereto.

All laws relative to the formation of corporations prior to 1866 were specifically repealed, excepting in so far as they appear in the revision of that year. The repeal of all such laws is provided for in Chapter 122 of the Revision of 1866.

Reference to these original acts of the Legislature and the subsequent revisions, shows that from the beginning, the legislation of the State of Minnesota, relative to the formation of corporations, has provided that all corporations organized for the purpose of constructing and operating any

work of *internal improvement,* not only were authorized to, but must organize under Title 1 or the various acts from which it is compiled; and that any corporation organized for purely *private enterprise* should organize under Title 2.

Counsel for the City base their entire argument on this question of the right of the Company to incorporate under Title 1 on two erroneous premises.

First—That because the word "transportation" was added to Title 2 in 1870, from that time on, corporations organized to construct and operate street railways must incorporate under Title 2, and could not after that date lawfully incorporate under Title 1.

Second—That the words "railroad" and "railway" are synonymous, and do not include street railways; and, therefore, the use of the word "railways" in Title 1 of Chapter 34 excludes street railways and prevents the organization thereunder of any corporation whose business is to construct and operate street railways.

Both of these statements are in direct conflict with the entire legislative and judicial construction of Title 1 by the State of Minnesota; and they also wholly ignore and disregard the further provision of said Section 1, Title 1, embraced within the language "and all works of internal improvement which require the taking of *private property* or any easement therein."

Both the legislative and judicial construction of said Title 1 of the Revision of 1866 by the State show that a "street railway" has always been classed as a work of internal improvement, within the meaning and language of said Title 1 of the Revision of 1866, as we shall demonstrate later in this brief.

The City claims that because the word "transportation" is found in Title 2 that the Company could have organized under that Title for a period of thirty years, instead of under Title 1 for a period of fifty years; and if it *could* organize under Title 2 it was unlawful for it to organize under Title 1.

An examination of the legislation of the State of Minnesota relative to that portion of Title 2, now under consideration, shows that from the organization of the State in 1858 down to the year 1868, the word "transportation" did not appear in Title 2 at all. The Legislature of the State in 1868 amended Title 2 by inserting the word "transportation" and in the year 1869 again amended said title by taking out the word "transportation" and again inserted it by an amendment in the year 1870.

All of this legislation and the report of the commissioners relating thereto are found in an appendix to this brief in which are printed in full the compilation of the statutes and laws of the State relating to these portions of Titles 1 and 2.

If the contention of the City is correct, to the effect that a corporation for constructing and operating a street railway cannot organize under Title 1, but may under Title 2 because the word "transportation" appears in Title 2, it necessarily follows that prior to the time the word "transportation" was inserted in Title 2 there was no law in the State of Minnesota, which authorized a corporation to be formed for the purpose of operating any kind of street railway lines; that is, for twenty years preceding 1870 a corporation operating a street railway could not be organized in the State of Minnesota. The mere statement of

this condition discloses the absurdity of the City's contention in this regard.

The Supreme Court of Minnesota in construing the first section of Title 2 has always held that corporations authorized to be organized thereunder are for purposes of a *strictly private character* as distinguished from quasi public corporations, or corporations formed for *works of internal improvement.*

In the case of *Brown v. Corbin,* 40 Minn. 510, that Court said:

> "The kinds of business specifically enumerated (in Title 2) bear no common analogy to each other, except that they are all for pecuniary profit and of a *strictly private character,* as distinguished from those to be carried on by *quasi public* corporations authorized to exercise the right of eminent domain."

This construction of Title 2 was made by the highest Court of the State, nineteen years after the word "transportation" was inserted therein, and four years prior to the 1893 amendment to Title 1 hereafter referred to.

If the word "transportation" is broad enough to cover street railways, it is broad enough to cover commercial railways; and it would be just as logical to contend that a corporation organized for commercial railway purposes must organize under Title 2 instead of Title 1, as to contend that a corporation created for street railway purposes should so organize; but the Supreme Court of Minnesota has held that railroad companies are not "transportation companies" within the meaning of the language of Title 2. (See *State ex rel. Commissioners v. Iverson,* 97 Minn. 286-288.)

It is a well known fact that in the earlier history of the country, transportation companies were not uncommon, and included stage companies, express companies, and such com-

panies as were engaged in using railways and highways without owning the tracks or facilities used.

This Court in the case of *Lake Superior & Mississippi Railroad Company v. United States,* 93 U. S. 442, has fully discussed the history of the words "transportation companies" and clearly pointed out the distinction between a "railway company" and a "transportation company" which may be using the railway and fixtures of the railway company without having any interest in the roadbed, permanent fixtures or equipment of the latter company.

Said Title 2 of the Revision of 1866 has had many provisions added to it since 1866. All of which, however, relate entirely to corporations other than those authorized to engaged in works of internal improvement; or, as the Supreme Court of the State of Minnesota said in the case of *Brown v. Corbin, supra:*

> "Corporations for pecuniary profit and of a strictly private character, as distinguished from those to be carried on by quasi public corporations."

Counsel for the City assert, that because the Supreme Court of the State, in construing certain regulative measures relating to railroads, held they were not applicable to street railways, that fact, demonstrates that a corporation could not organize under Title 1, for the purpose of constructing and operating street railways.

As already stated, this assertion is in direct conflict with both the Legislative and Judicial construction of said Title 1 by the State; and also assumes that every regulative measure passed relative to any particular class of business to be conducted by a corporation organized under Title 1, must apply to *every* corporation organized under that Title regardless of the nature of the business conducted by such

corporation, or the purpose and scope of such regulative measure. Later in this brief we shall refer to some of these regulative measures relating to railroads, and relied on by the City as a basis for the above assertion, and shall then point out the ground upon which the Court based its conclusion, that they were not applicable to street railways.

It will then be seen that the reasons given by the Court why such measures had no application to street railways in no way justifies the position taken by counsel for the City on this particular question.

Counsel for the City at pages 59, 61 and 68 of their brief state, that subsequent amendments to said Title 2 show that many corporations engaged in works of a public character are authorized to incorporate under said Title 2, naming "gas companies" as one. The amendment to said Title 2 which include gas companies, is Chapter 10 of the Laws of 1878, and this specifically provides that gas companies may organize under said Title 2 for *"manufacturing gas"* but has no relation to corporations for *furnishing* or *supplying* gas to the public, and which must of necessity acquire an easement in the streets or in private property for that purpose.

While on the other hand, the amendment to said Title 1 passed by the Legislature in 1893 specifically provides for corporations authorized to *supply* the public with gas light, electric light, etc., clearly showing that the Legislature had in mind the distinction between a corporation organized solely for the purpose of *"manufacturing gas"* as a private enterprise as distinguished from a corporation organized to *furnish* gas to the public; the first being an enterprise clearly of a private character, while the second is a work of internal improvement, and therefore, comes under Title 1 and not under Title 2.

In the Revision of the Statutes of Minnesota for 1894 Title 1 is continued as amended in 1893 in the particulars above indicated. Title 2 is also continued in the same form as before and contained the authorization to form corporations thereunder for the "manufacture of gas;" thus again clearly showing that the Legislature recognized the distinction between a corporation organized to "manufacture gas" and a corporation authorized to "supply" the public with gas.

Counsel for the City also refer to the fact that by said 1878 amendment to Title 2 there were included corporations authorized to construct and operate warehouses, public halls, elevators and hotels; and that all such corporations are of a public character.

Counsel for the City seem to loose sight of the fact that all classes of business affected with a public interest and thus given a public character, are not necessarily works of internal improvement. This Court has held that the business of a public elevator in which grain is stored and handled is impressed with a public character sufficient to justify regulation of its methods of doing business. Such regulative measures are sustained, not upon the ground that the business itself is a work of internal improvement, but that the nature of the business is such that the public interests require it should be subject to proper Legislative regulation. This is equally true of a hotel, or warehouse or public hall. No one would be justified in claiming that a hotel or public hall is a work of internal improvement, or could exercise the right of eminent domain; and yet, each is used by the public and the nature of the business is of such a character as to require Legislative regulation in order to protect the public.

This power of police regulation is broad in its scope and

is exercised over any business which involves the public welfare, the public safety, the public health or convenience.

This distinction is clearly recognized by this Court in the case of *Munn v. Illinois*, 94 U. S. 113, and to which counsel for the City have made reference in their brief. This Court said, at page 124:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of Government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.
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> * * * * *

> This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treaties *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The real distinction between a corporation organized to carry on a *work of internal improvement* and one engaged in a work of *public character*, is that the first must continue its business and serve the public and can be compelled by mandamus to do so in case it does not; while the latter class, engaged in work of public character only, can abandon its business at any time. To illustrate, a corporation owning and operating a street railway can be compelled to continue such operation; while a corporation owning and operating an elevator, hotel or public hall can not be so compelled but can abandon such business at any time.

The operation of a street railway has always been held at common law to be a work of internal improvement. This distinction between the two classes of corporations, above

referred to, and the fact that a street railway is at common law a *work of internal improvement,* is fully discussed in the case of *State, ex rel W. S. Grinsfelder v. Spokane Street Railway Company,* 41 L. R. A. 518, where the Court said:

> "The controversy is whether, under the principles of common law, a corporation authorized to transact business which appellant is authorized to do, and which it has actually transacted, in the acquisition and operation of its street railway lines, owes a duty to the public to continue the operation. The franchise was granted to appellant by the state, not for its profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and intercourse for the public. It is a common carrier. *New York & M. Line R. Co. v. Winans,* 17 How 30, 15 L. ed. 27; Booth, Street Railways, § 1; *Talcott v. Pine Grove Twp.* 1 Flipp. 120. It was granted the power of eminent domain, a part of the sovereignty of the state, and with the consent of the municipalities, it may lay its tracks over the public streets and highways. Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. *Thomas v. West Jersey Ry. Co.,* 101 U. S. 71, 25 L. ed. 950. The opening of a highway or ferry and the common carriage of persons or property over them was at common law a franchise and a matter of governmental concern. It was a part of the subjects in immediate possession of the sovereign power, and to exercise which demanded a special grant or charter from the sovereign. Such avocations in their nature, and history, are unlike the private avocations of milling, hotel keeping and traffic, which all may be pursued at pleasure unless restrained by the exercise of police powers. Judge Kent says in 3 Kent, Com. p. 458, that there are certain franchises which are understood to be royal privileges, in the hands of a subject. The right to set up a ferry or road, and the asking of tolls, is one of them, and in this the public has an in-

terest. In 2 Bl. Com. p. 37, it is said that a franchise is a branch of the royal prerogative in the hands of the subject, such as the right of taking toll for a bridge, way or wharf. In *Prosser v. Wapello County,* 18 Iowa 327, it was held by Judge Dillon that a public ferry franchise could only be conferred by the government, and must be founded on grant license, or prescription. Ownership of the soil on each side of a stream does not confer the right to establish thereon without a grant a public ferry at which tolls are charged. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. 41 L. R. A. And it is not in degree only that these franchises differ from the mills and inns. The one is private property, the other is a public function, and, when delegated to either persons or corporations, still retains the public use. In *Gates v. Boston & N. Y. Air Line Line R. Co.,* 53 Conn. 333, it was said: 'One public right consists in the continuous uses of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held, subject to, and charged with this obligation.' "

Following this language the Court refer to a large number of cases in support of its statements, including several in this Court.

The second premise upon which counsel for the City base their argument on this portion of the case is, that the words "railroad" and "railway" are synonymous and do not include street railways; and, therefore, the use of the word "railways" in Title 1 of Chapter 34 excludes street railways

and prevents the organization thereunder of any corporation whose business is to construct and operate street railways. As already stated, counsel for the City wholly ignore and disregard the further provision of said Section 1, Title 1, embraced within the language "and all works of internal improvement, etc."

In the Revision of 1866 there was incorporated into Title 1 all the material provisions relating to the regulation of railways, plank and turnpike companies, ferry, canal, telegraph, bridge, and in fact, all corporations engaged in works of internal improvement and whose incorporation was provided for either prior to or in the Revision of 1866. Since that time there have been many regulative measures passed by the State, which are applicable to various classes of business embraced within the term "works of internal improvement," and these have all been added to Title 1 in subsequent revisions of the Statutes of Minnesota.

At this time we desire to call the Court's attention to the Legislative, Judicial and Practical construction placed on said Title 1, Chapter 34 by the State of Minnesota since 1866.

AS TO LEGISLATIVE CONSTRUCTION OF TITLE 1.

Counsel for the City, at page 76 of their brief, state that the first time the words "street railway" appears in the Statutes of the State is in the Compilation of 1905, and that the first time it appears in the legislation of the State is in 1894. They either by oversight or intention, omit any reference to Chapter 74 of the Laws of 1893, which is the first material amendment to Section 1 of Title 1 of Chapter 34, as it appeared in the Revisions of 1866 and 1878.

This act is in itself a complete answer to the entire argument advanced by the City, to the effect that corporations organized for the purpose of owning and operating street railways, were never intended by the Legislature of the State, to be organized under said Title 1, and therefore could not so organize.

This act is as follows:

"Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one of title one of chapter thirty-four of General Statutes, 1866, be and the same is hereby amended so as to read as follows, that is to say:

Section 1. Any number of persons, not less than five, may associate for incorporation and become incorporated under and according to this title for the construction, maintenance and operation of any work or works of internal improvement requiring the taking of private property, or any easement therein, for public use, including railways, telegraph lines, canals, slackwater or other navigation upon any water course, bay or lake, dams to improve or create a water supply or power for public use, and any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power; and any citizens of the United States, not less than nine in number, owning any railway now or hereafter constructed for public use within this state for transportation of persons or property, or organized for the purpose of maintaining and operating under any lease or contract a railroad constructed for like public use, may, by making and filing articles of association under and according to this title, acquire and enjoy the rights, powers, privileges and franchises hereinafter granted, and may, by filing in the office of secretary of state a resolution of such corporation expressing its intent to construct, maintain and operate any branch line, become empowered to construct, maintain and operate the same in connection with its main line,

subject, however, to the provisions of this title and the general laws of this state, and any corporation formed hereunder may construct, maintain and operate telegraph lines along or over its lines of railroad, and any corporation formed hereunder or under any act hereby amended, may charge and collect a reasonable compensation for its service. But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village, a railway of any kind or any subway, pipe line or other conduit for supplying the public with water, gas light, electric light, heat, power or transportation or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making just compensation therefor, as herein provided.

Provided, that the State of Minnesota shall at all times have full power and authority to supervise and regulate the business methods and management of any corporation existing and operating hereunder, and shall also have full power and authority at all times to fix the compensation which shall or may be charged or received by any corporation existing and operating hereunder. And any corporation organized under this act shall be subject to any condition from time to time imposed by such village or city, through its board of trustees or city council. And provided, further, that the common council of any city and the board of trustees of any village at the end of each and every five years from and after the granting of any franchise for the construction of any street railway, telephone, water-works, gas and electric light, heat or power works, or any or all of them, shall have the right, when authorized so to do by a two-thirds vote of the electors of such municipality as hereinafter provided, to acquire the same by purchase and there after operate the same, upon paying to the company, corporation or person owning the franchise the full and true cost and value thereof, to be determined by the usual proceedings for

acquiring public property for public use under the right of eminent domain upon petition of the authorities of such municipality."

The Court will notice that this act in no way extends the scope of Title 1, so far as it relates to the authority or right to incorporate or organize corporations thereunder, to own or operate any kind of a railway, whether it be street or commercial. Hence, if Title 1 did not authorize the formation of a corporation for the purpose of operating street railways prior to the passage of the amendatory Act of 1893, it does not now; for the words "street railway" do not appear in that portion of the Act authorizing the formation of corporations to construct or operate any railway, but in subsequent provisions of the Act, limiting the powers of corporations already authorized to organize under the Act.

In this proviso it states:

"Any corporation *organized under this Act* shall be subject to any condition from time to time imposed by such village or city through its Board of Trustees or City Council, and provided further, that the Common Council of any city, and the Board of Trustees of any village, at the end of each and every five years from and after the granting of the franchise for the construction of any *'street railway'* etc., shall have the right to acquire the same by purchase, etc."

It thus seems clear and indisputable that the Legislature of the State in 1893 understood and believed that Title 1, Chapter 34, authorized the formation of corporations thereunder for the operation of a street railway.

This 1893 amendment to Title 1 further provides as follows:

"But no corporation formed under this Title shall have any right to construct, maintain or operate upon or within any street, * * * alley or other highway of

> any city or village, a railway of any kind * * * for supplying the public with *'transportation'* * * * without first obtaining a franchise therefor from such city or village."

The word "railway" as used in that portion of the 1893 amendment to Title 1, last above referred to, can only mean that kind of railway which is operated upon a street or highway; and counsel for the City have devoted many pages of their brief to demonstrating, that such a railway is a *street railway,* and we concur in their claim in that regard. Of course it is self-evident, that this prohibition would cover any form of railway, but the word "railway" as herein used by the Legislature is comprehensive and intended to embrace any railway operated by any corporation organized under Title 1.

The proviso following this language wherein the Legislature say that the City shall have the right to acquire *"any street railway,"* owned and operated by any corporation organized under the Act, clearly demonstrates that the Legislature had in mind street railways in using the term "railway" in the Act.

The Legislative intention relative to this Section as disclosed by the 1893 amendment must now be determined as if the amendment had always been in the section. As stated by this Court in *Blair v. Chicago,* 201 U. S., at page 474:

> "The rule was thus stated in *Farrell v. State,* 54 N. J. Law, 421: 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended.' *People v. Circuit Judge,* 37 Mich. 287. In *Conrad v. Nall,* 24 Mich. 275, a Section in the Chapter of the code was amended and it was held that it was not intended to operate independently of the other provisions of the Chapter, but that the whole chapter in its pres-

> ent form must be read as one act. The rule is correctly stated in Endlich on Statutes, section 294, as follows: 'A statute which is amended is thereafter and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matter superseded by the amendments eliminated.' "

The City bases one if its contentions that the Company should have organized under Title 2 instead of Title 1, upon the fact that the word "transportation" was inserted in Title 2 in 1870.

The unsoundness of this position is disclosed by the fact that in the 1893 amendment to Title 1, the Legislature specifically provided that,

> "No corporation formed under this Title shall have any right to construct, maintain or operate upon or within any street, alley or highway any railway of any kind for *supplying the public with 'transportation,'* without first obtaining a franchise therefor."

If it is true that the word "transportation," as used in Title 2, necessitated the formation of corporations thereunder for the purpose of owning and operating street railways, why did not the Legislature of the State place this provision relating to street railway companies in Title 2 by amendment and not Title 1?

This 1893 amendment to Title 1 in no way changes or effects Title 2, and if the City's contention is correct, we have this anomolous and absurd condition, to-wit:

Since 1893 a corporation could organize under Title 1 for the purpose of owning and operating street railways within city limits; but such a corporation cannot enter up-

on the streets of the city without first obtaining its consent; during this same period of sixteen years a corporation could also be organized under Title 2 for the same purpose, and can enter upon the streets of the City without first obtaining the City's consent; for the limitation imposed by the 1893 amendment of Title 1 upon any corporation organized under that Title, for the purpose of owning and operating a street railway, is specifically limited to such corporations as are organized *thereunder,* and not to corporations organized under Title 2. The language is:

> "But no corporation formed *under this title* shall have any right to construct, maintain or operate upon or within any street, alley or other highway of any city or village, a railway of any kind without first obtaining the consent of the City or Village."

If a corporation engaged only in operating street railway lines *within* a city must organize under Title 2, as claimed by the City, and a similar corporation engaged in operating street railway lines within and outside the city limits, must organize under Title 1 as decided by the Supreme Court of Minnesota in the case of *Minneapolis & St. Paul Suburban Railway Company v. Manitou Syndicate,* 101 Minn. 132, where the Court held that notwithstanding such a corporation stated in its Articles that it organized under Title 2, it was nevertheless organized under Title 1, we have two different corporations engaged in the same business, one of which must organize under Title 1 and be subject to all the limitations and conditions therein contained, and the other must organize under Title 2, and be exempt from such conditions.

It hardly seems necessary to state that the Legislature never intended to create any such condition or to make any such distinction between two corporations of the same class.

If the City's contention is correct, that a corporation, such as this Company, must organize under Title 2, instead of Title 1, then we have this further anomalous condition that a corporation organized under Title 1 to own and operate a street railway is subject to all the legislative regulations and provisions contained in Title 1, so far as they are applicable to that class of railways, and also to the further specific provisions of the amendment to Title 1 in the Act of 1893, two of which are as follows:

> "The State of Minnesota shall at all times have full power and authority to supervise and regulate the business methods and management of any corporation *existing and operating* hereunder, and shall also have full power and authority at all times to fix the compensation which shall or may be charged or received by any corporation existing and operating hereunder."
>
> And "The Common Council of any city and the Board of Trustees of any village, at the end of each and every five years from and after the granting of any franchise for the construction of any street railway, * * * shall have the right when authorized so to do by two-thirds vote of the electors, to purchase and thereafter operate the same."

upon the conditions and in the manner provided in that act.

This power of regulation and this right to purchase is confined to street railway corporations *organized and existing under Title 1.* It necessarily follows then that if a corporation organized for the purpose of owning and operating a street railway can incorporate under Title 2, it can relieve itself from this power of state regulation and from the right of the City to purchase its property, as provided in the 1893 amendment to Title 1.

Can it be assumed for a moment that the Legislature of the State intended to make any such distinction, or to have such separate and distinct powers and rights possessed by

two different corporations engaged in the same class of business? Yet if the City's contention on this question is correct, such conditions have actually existed since the amendment to Title 1 in 1893.

The 1894 Compilation of the Statutes of the State carries over Title 1 in the same form as it existed in 1866 together with the 1893 amendment; and this Title was again transmitted into the Revision of 1905 with only this limitation: That the power of eminent domain, which corporations organized for the operation of street railways had prior to the Revision of 1905, was limited in that Revision by this proviso:

> "Provided that no street railway shall have or exercise such rights within the limits of any city or village."

The only power of eminent domain possessed by corporations organized for the purpose of operating street railways came from Title 1 as it existed prior to 1893, and as amended by Chapter 74 of the Laws of 1893, until 1899; when the Legislature passed Chapter 350 of that year. *But this Chapter was specifically repealed by the Revision of 1905,* and the only power of eminent domain possessed since that time by corporations organized for the operation of a street railway, comes, as it did prior to 1899, from the general provisions contained in Title 1 of Chapter 34.

Counsel for the City also assert that such corporations never possessed the power of eminent domain until the Act of 1899 gave it, and then only outside of the city limits; this is not correct; and the Supreme Court specifically state otherwise in the case of *Minneapolis & St. Paul Suburban Railway Company v. Manitou Forest Syndicate,* 101 Minn., page 132. The Court said in its opinion on page 150:

> "Some confusion grows out of the fact that Chapter 58, R. L. 1905, is a consolidation of titles 1 and 2,

c. 34, G. S. 1894, but the revisers and the legislature expressly declared by section 2838 that all existing rights were continued until otherwise provided by law. Whatever powers appellant company possessed under title 1 were continued unless the contrary appears. In section 2592, G. S. 1894, street railways were not specifically mentioned; but the right of eminent domain was conferred upon such roads outside of cities and villages by chapter 350, p. 461, Laws of 1899. *This chapter was expressly repealed by R. L. 1905;* but the right to exercise the power was reserved to such companies by section 2841, where street railways are designated as works of internal improvement, and by section 2842 and section 2926, where the right of eminent domain is expressly conferred upon all such corporations. We discover nothing significant in the fact that the Revised Laws add 'street railways' to the list of public service corporations with the right of eminent domain, and at the same time prohibit their exercise of the right within cities and villages by the proviso in section 2842. These provisions for the exercise of the right of eminent domain by street railways without the limits of cities and villages do not warrant the inference that it was the intention to withhold the right from corporations operating in the country lines of the street railway type; in other words, to wipe out the distinction theretofore existing between commercial and street railroads, except in cities and villages. Whether a corporation may be organized under the Revised Laws for the purpose of operating roads of the street railway type beyond the limits of cities and villages, without being subject to state control and the railroad and warehouse commission act, we need not inquire. Appellant company does not belong to that class."

The Supreme Court in this case directly hold that a corporation organized for the purpose of operating street railways acquires the power of eminent domain because it is conducting a *work of internal improvement.*

That is in effect, a decision by the Court that corporations of this class come within the provisions of Title 1 of Chapter 34 as it existed in the Compilation of 1866, which authorized the formation of corporations thereunder for "all works of internal improvement, which require the taking of private property or any easement therein;" and it seems to us, completely answers all that portion of the City's contention that corporations organized for the operation of street railways cannot organize under Title 1, because they do not possess the power of eminent domain, and are not engaged in a work of internal improvement.

Counsel for the City take the position, that a corporation not only *may* but necessarily *must* exercise the power of eminent domain in connection with its business, in order to incorporate under Title 1. That is, if the corporation is not compelled to exercise the right of eminent domain in carrying out its purposes, then it must organize under Title 2. This seems to us wholly unsound. Many corporations that are authorized to organize under Title 1 may never need to exercise this power in order to accomplish the purposes for which they were organized; such as corporations operating street railway lines, gas light, electric light, heat or power for public use, or even canals or corporations engaged in slackwater and other navigation.

On the other hand, conditions might arise where such corporation would have to exercise that right in connection with their business. It is self-evident that a corporation engaged in "slackwater navigation" might never own a dock or landing place of its own; but confine itself solely to transportation of property and passengers on the water, using only public wharves and docks; so a corporation operating a street railway might confine itself to transportation of passengers and property on the streets of a city; and yet it cannot be

doubted but what a corporation engaged in "slackwater navigation," under the conditions above indicated, would be authorized to incorporate under Title 1.

A corporation operating a street railway system in the City might require the power of eminent domain in order to obtain property upon which to locate its power houses, shops, offices and barns, all of which are necessary adjuncts to the business of conducting a street railway. It can hardly be claimed that under such circumstances such a corporation would not have the power of eminent domain for those purposes. On the other hand, such a corporation might acquire the property for all such purposes by purchase, and then never need to exercise the power; just as a corporation operating a commercial railroad might acquire its entire right of way by purchase, and thus never exercise the power.

Counsel for the City seem to place an erroneous construction upon the class of property over which this right of eminent domain may be exercised. Under Title 1 it is confined to *private* property or any easement therein. Now, a street railway is ordinarily operated over the streets of a city. These streets are already dedicated to a public use, and are, therefore, not *private* property; and as to those, the corporation must obtain the consent of the State, or the City, in which the street is vested as trustee for the public use; and hence, so far as the use of the street is concerned, there is no necessity for the exercise of this power, and it may be there is no right to so exercise it. But when such a corporation is obliged to acquire private property to be used in connection with its street railway lines, then it must or may exercise the right of eminent domain. This is equally true of corporations operating water-works, electric

light works, heat or power works, or engaged in the business of slackwater or other navigation and all kinds of railways.

If the test of whether a corporation should organize under Title 1 or Title 2 is its *actual* use of the power of eminent domain, the Court can readily see what confusion would arise in connection with the legality of incorporation.

The real test of the character of the corporation, and under which Title of Chapter 34 it must incorporate, is determined and fixed by the powers it proposes, or *may need to exercise,* as disclosed in its Articles of Incorporation, and whether or not the business in which it proposes to engage is a work of *internal improvement,* quasi public in its character, as distinguished from that of a *purely private nature.*

The name "Minneapolis Street Railway Company" has no significance, as claimed by counsel for the City at page 82 of their brief. The Company might just as well have called itself the "Minneapolis Railway Company," or "Minneapolis Construction & Improvement Company," or any other name it saw fit to adopt. This would have no determining effect on its character as a corporation; but the powers that it specified in its Articles and which it intended, or might need to exercise, would be the controlling feature. It has been repeatedly so held by the Supreme Court of Minnesota, see

First National Bank v. Plow Company, 58 Minn. 167;

Arthur v. Willius, 44 Minn. 415.

In the latter case the Court said:

> "If the corporation is organized for the purpose, as declared in the articles of association, of carrying on both a manufacturing business and also some other kind of business, not properly incidental to or necessarily connected with the manufacturing business, the mere fact that the corporation never exercised all its

> powers and never in fact engaged in or carried on anything but a manufacturing business, will not bring the case within the constitutional exemption."

This exemption relieved stockholders of a manufacturing corporation from liability for corporate debts.

In *Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate,* 101 Minn., 132, the Court said:

> "It is not controlling that the incorporators declared they proposed to incorporate under Title 2, if in fact they did comply with and are incorporated under the provisions of Title 1. In *International Boom Co. v. Rainey Lake River Boom Corporation,* 97 Minn., 513, 107 N. W. 735, it was held that a corporation cannot be made merely by being labeled as such, if its declared objects show it to be something else; that the real character of a corporation must be determined from those portions of its articles of association expressing the nature and scope of its business. *State v. Minnesota Thresher Mfg. Co.,* 40 Minn., 213, 41 N. W. 1020, 3 L. R. A. 510."

In the present case the Company was organized to operate railways other than on the streets of the city. Its Articles of Incorporation state that the company is

> "To construct and operate railways in the streets and highways of the City of Minneapolis, and its *suburbs,* in the County of Hennepin."

The word "suburb" means the territory outside of the City of Minneapolis, and near or adjacent thereto. Hennepin County from the East to the West side is about twenty-five miles, and from the North to the South about twenty miles. The City of Minneapolis is located on the East side of the County.

The City alleges in its answer that in 1875 the area of the City of Minneapolis did not exceed 11¼ square miles. Many miles to the South of the City and on the border of

Hennepin County is Fort Snelling, an important Governmental station. In the Western part of Hennepin County, and about twenty miles from the City of Minneapolis is located Lake Minnetonka, which has always been a great summer resort for residents of the City.

The Company was authorized to construct and maintain railway lines in Hennepin County, and had the power and authority to construct any and all railway lines it desired within Hennepin County to reach such important points as Fort Snelling and Lake Minnetonka.

Can it be claimed for a moment that if the Company had attempted to build a railway line across Hennepin County to Lake Minnetonka or to the South across Hennepin County to Fort Snelling, it would not have had the power to condemn a right of way for that purpose? These enterprises were undoubtedly in contemplation by the incorporators at the time the Articles of Incorporation were prepared; for they stated in their Articles that they organized for the purpose of constructing *railway lines in Hennepin County*, outside of the City of Minneapolis.

From the time the Company organized on July 1, 1873, until the passage of the ordinance of July 9, 1875, and its acceptance by the Company, it might have built railway lines outside of the City of Minneapolis within Hennepin County and made this its principal business. It had the power to do so under its Articles of Incorporation; and the mere fact that it accepted an ordinance from the City to construct and operate lines of railway within the streets of the City, did not deprive it of this power, or change its character, or make its incorporation under Title 1 illegal.

In *Shreveport Traction Co. v. Kansas City, etc., Ry. Co.*, 44 So. 457, the court said:

"In an examination for the purpose of ascertaining whether a body asserting itself to be a railroad corporation be legally such, and, if so, what its rights, privileges, and franchises are, we must refer, not to the relations between that body and the city authorities by whom it has been authorized to construct and operate railway tracks on its streets, either by permit, by way of license, or by way of contract, but to the State Laws. The city authorities have no legal power to create corporations or to grant franchises. That power is lodged in the state. What the defendant refers to as 'franchises' have not that character in law. They are merely what are known as 'secondary franchises' that is to say, instrumentalities by means of which the corporate powers granted by the charter may be exercised. In *Tilton v. Railroad Company,* 35 La. Ann. 1069, this court said:

" 'The city does not grant franchises. This can be done by the state alone. But the city can concede the right of way through her streets, public places, and other property.' "

In *Gould v. Fuller,* 79 Minn. 414, the Supreme Court of Minnesota said:

"The powers of a corporation and the purposes for which it is organized must be determined by the Articles of Incorporation."

In *Merchant's National Bank v. Minnesota Thresher Co.,* 90 Minn. 144, the court held:

"The articles of an alleged manufacturing corporation are the sole criterion for determining the intention of the incorporators and the purpose for which the corporation was organized."

The effect of Counsel's argument as shown at page 100 of their brief would be, that a corporation organized to operate railways must confine itself to either street railways

or commercial railways; and cannot operate both at the same time; and if it organized under Title 1 for fifty years to operate a commercial railway, and should afterwards operate a street railway only, then the Company would lose its corporate rights and powers under Title 1, including its right to exist as a corporation for fifty years; and in some way, not pointed out by Counsel, become a corporation under Title 2, with corporate life for only thirty years. This question at once arises. If such a corporation ceased to operate a street railway and engaged in constructing and operating a commercial railway, does it then pass back into Title 1, and become reinvested with its original powers and corporate life for fifty years? Such a theory is impossible. Its rights and powers must be and are fixed by its Articles as filed, and it does not sufficiently partake of the human to be "born again."

There is not a word in the Laws of Minnesota or the decisions of its Courts which prevents a corporation organized to operate railways from owning and operating a commercial railway and a street railway at the same time. On the contrary, the Supreme Court of the State in the case of *Minneapolis, St. Paul & Suburban Railway Co. v. Manitou Syndicate,* 101 Minn., *supra,* held that a corporation could do so, and that such a corporation must organize under Title 1. The Suburban Company in that case was engaged in operating railway lines outside of cities and also in cities and villages. The City of Stillwater for instance, in and through which that Company operated its lines is a city of over fifteen thousand inhabitants, and that Company has a complete system of street railways in that city. There are several other cities and villages in and through which it operates its lines of railway; and all of the lines of the Suburban Company in such cities and villages are

operated under grants from such cities and villages similar to the grant made to this Company by the City of Minneapolis.

In the case of *Newel v. Minneapolis, Lyndale & Minnetonka Ry. Co.*, 35 Minn., page 112, the facts were as follows: The Lyndale Company operated a street railway and a commercial railway extending from the City Hall in Minneapolis to Lake Minnetonka, and operated its system by steam motor. So far as it used the streets in Minneapolis it was operating under an ordinance giving it the right to use the streets; and from the City limits to Lake Minnetonka it was operating on a right of way acquired by purchase or condemnation.

Newel, who was a property owner along one of the streets in the City over which the Company operated its lines, brought an action for damages; claiming that the Company's use of the streets imposed an additional servitude thereon, which entitled him to damages. The whole question turned upon whether or not the Company, so far as its operation on the streets of the City was concerned, was operating a *street railway*. The Court held that notwithstanding that it carried passengers, and some express and freight matter, it was still, in effect, a street railway while operating within the limits of the City. The Court said at page 117 as follows:

> "Upon its findings of fact the trial court was of the opinion, and so found, as conclusions of law, (2) that defendant's railway, as constructed and operated on First avenue south, and elsewhere within the limits of the City as bounded when this action was commenced, was and is a passenger street railway, and this character is not changed by the fact that between some point outside of said City limits and Lake Minnetonka it ceases to be a passenger street railway; (3) that the construction and operation of said railway partly on

that part of First avenue south of which the 'ultimate fee' is in the plaintiff does not constitute any additional burden or servitude beyond the public easement contemplated in the dedication of the street nor any taking or appropriation of the property of the plaintiff as owner of the fee.

Both of these conclusions are, in our judgment, correct.

The first clause of the first, viz., that defendant's railway is a passenger street railway, is in effect a finding that its use consists in the transfer of persons along or over the streets within the city, and would seem to be a mere result or summing up of the previous findings of fact upon that subject, and it is therefore, perhaps, quite as much in the nature of a conclusion of fact as a conclusion of law. It is enough to say in regard to it that it is the legitimate result of the previous findings of fact. The last clause of this conclusion, viz., that this character of the railway is not changed by the fact that at some point outside of the city it ceases to be a passenger street railway, is right as a conclusion of law. If it is, in fact, a passenger street railway within the city limits, how can it become anything else *there* because it becomes something else elsewhere? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of streets is just as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other."

The right of the Company to exist as organized, and to exercise the powers as declared in its Articles of Incorporation, has never been questioned by the State of Minnesota, or by its Attorney General; although the statutes of the State for the last twenty-five years have made it the duty

of the Attorney General to proceed against any corporation assuming to exercise any powers not duly conferred upon it by the Laws of the State. See Section 5 of Chapter 76, Statutes of 1878.

If the contention of the City is correct, this Company has been exercising unlawful powers since its organization, and has, since July 1st, 1903, continued to exercise the powers of a corporation, although it ceased to exist at that time.

The Legislature of the State recognized the right to organize under Title 1 for the purpose of operating street railway lines long prior to the time the amendment to Title 1 was made by Chapter 74 of the Laws of 1893.

As early as the year 1881 the Legislature of the State passed Chapter 200 of the Special Laws of that year granting to the "Duluth Street Railway Company" its rights in the streets of Duluth. Section 1 of said Chapter 200 provides as follows:

> "That the Duluth Street Railway Company, *a Corporation, organized and existing under the General Railroad Laws of this State*, be and is hereby granted, during the term of its charter the exclusive right and privilege of constructing and operating a single or double track for passenger railway lines with all necessary tracks for turnouts, sidetracks and switches in any of the streets of the Village of Duluth, and its suburbs, including New London and Oneota, and in the roads connecting the same, subject to the terms, conditions and forfeitures hereinafter contained," etc.

The only Railroad Law of the State at that time was said Title 1 of Chapter 34, and the Duluth Street Railway Company organized by adopting Articles of Incorporation nearly identical with those of this Company.

THE QUESTION OF THE AUTHORITY OR POWER OF THE COMPANY TO EXERCISE THE RIGHT OF EMINENT DOMAIN HAS BEEN SETTLED BY THE SUPREME COURT OF THE STATE IN SEVERAL CASES IN WHICH THE COURT HOLDS THAT CORPORATIONS IDENTICAL WITH THIS COMPANY CAN EXERCISE SUCH POWER WHEN NECESSARY.

Sections 1, 2 and 3 of the Articles of Incorporation of the Duluth Street Railway Company and also of this Company are as follows:

DULUTH STREET RAILWAY CO.	MINNEAPOLIS STREET RAILWAY CO.
"FIRST.	"FIRST.
The name of this corporation is Duluth Street Railway Company. The general nature of its business is to construct and operate *Railways* in the streets and highways of the village of Duluth and its suburbs in the County of St. Louis and State of Minnesota, and the principal place of transacting the said business is in the Village of Duluth.	The name of this corporation is the Minneapolis Street Railway Company. The general nature of its business is to construct and operate *Railways* in the street and highways of the City of Minneapolis and its suburbs in the County of Hennepin, State of Minnesota, and the principal place of transacting the said business is the said City of Minneapolis.
SECOND.	SECOND.
The time of commencement of said corporation is the 25th day of October, A. D. 1881, and the *period of its continuance shall be fifty years thereafter.*	The time of commencement of said corporation is the first day of July, A. D. 1873, and the *period of continuance of the said corporation is fifty years thereafter.*
THIRD.	THIRD.
The amount of capital stock of said corporation is	The amount of capital stock of the said corporation

one hundred thousand dollars to be paid in as follows: Five per cent of the same at the time of subscribing for said stock and the balance in installments from time to time as the same shall be ordered by vote of the stockholders."

is two hundred and fifty thousand dollars, to be paid in as follows: Five per cent of the same at the time of subscribing for the said stock, and the balance in installments from time to time as the same shall be ordered by vote of the stockholders."

In the case of the *State v. The Duluth Gas & Water Company et al.*, 76 Minn. 107, the Court was called upon to determine whether or not certain provisions of the laws of the State relating to taxation were applicable to several corporations, including said Duluth Street Railway Company. This necessitated the determination by the Court of the character of the corporations as disclosed by the business in which they were engaged, and also under what laws such corporations were organized; and in relation to said Duluth Street Railway Company the Court said, at page 107:

> "The Duluth Street Railway Company was organized under G. S. 1894, c. 34, tit. 1, and the acts amendatory thereof,"

which is clearly a judicial recognition of the right to organize under Title 1.

The nature of the business conducted by the Duluth Street Railway Company is identical with that conducted by this Company, and both are works of internal improvement, and *may* require the taking of private property or an easement therein. If the Duluth company was properly organized under Title 1, it necessarily follows that this Company is also lawfully organized under that title.

If the Duluth Street Railway Company has the power to acquire by purchase, *condemnation* or otherwise a right of way outside of the city limits to be used in connection with its lines of street railway, then this Company has the same power, and, therefore, is not only authorized to, but required to incorporate under said Title 1 of Chapter 34.

The Supreme Court of Minnesota recognized the right of a street railway company to exercise the power of eminent domain in the case of *Carli v. The Stillwater Street Railway Co.*, 28 Minn. 373, where the Court said, at page 377:

> "It (the company's line) is built partly upon the alley and partly upon property acquired for the purpose from private owners by *condemnation* and purchase."

Telephone companies are no where mentioned in the legislation of Minnesota prior to the adoption of said amendatory act of 1893, when they are referred to in the same manner as street railway companies in that amendment; and yet, the Supreme Court of Minnesota has repeatedly held that a telephone company can exercise the power of eminent domain. In the case of *Northwest Telephone Company v. C. M. & St. P. Railway Company*, 76 Minn. 345, the Court said:

> "The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph, unless express statutory provisions govern the case. So the courts have almost universally held that telephone companies are engaged in public business, have the same public duty of serving the community, and may, when establishing their lines, exercise the right of eminent domain under the constitution and the laws. * * * Unquestionably, a line constructed, as is proposed by plaintiff, for public use, for the transmission of intelligence by wire, whether it be, technically speaking, a tele-

> graph or a telephone line, is a *work of internal improvement. Rippe v. Becker,* 56 Minn. 100, 57 N. W. 331; *Cater v. N. W. Tel. Exch. Co.,* 60 Minn. 539, 63 N. W. 111. Therefore its corporate owners may obtain its right of way by condemnation proceedings, as provided in G. S. 1894, Sec. 2604."

Counsel for the City at page 108 of their brief say: "There is not to be found in the decisions of the State of Minnesota a *single suggestion* that street railways have ever been invested with the general power of eminent domain."

Counsel for the City, evidently are not familiar with all the decisions of the state. We call attention to the case of *Minnesota Canal & Power Co. v. Pratt,* 101 Minn. 214, where the Court said:

> "Railway corporations were recognized as public service corporations and granted the right of eminent domain in this and other states long before there were any statutes to regulate the conduct of their business or to fix the rates which they might charge. Street car companies, telegraph and telephone companies, and gas and electric light companies were recognized as public service corporations and given the power of eminent domain under similar conditions."

Counsel for the City in discussing this question of the right to organize under Title 1 fall into another error at page 26 of their brief, when they state: "So far as we know, all commercial steam railway companies organized in the State of Minnesota prior to 1881 were organized under special charters, granted to them by the Legislature."

From the organization of the State down to the present time the Legislature of the State has been powerless to create any corporations by special charter or grant, except municipal. Section 2 of Article 10 of the State Constitution as originally adopted and as it has always existed since, provides:

"Section 2. No corporation shall be formed under special acts except for municipal purposes."

We call attention to these errors of Counsel, not in a spirit of captious criticism, but for the purpose of showing the fallacy which exists in the foundation upon which they largely build their argument on this branch of the case.

One of the City's main contentions on this proposition is that this Company cannot exercise the power of eminent domain, and for that reason could not organize under Title 1. It seems clear from the above cases that it can exercise that power under proper conditions, and *must* organize under Title 1.

Counsel for the City in their brief, at page 89, state that the Company does not specify in its Articles of Incorporation that it organized under Title 1, exclusive of the general nature of its business as declared in the first article. Also that "there is absolutely nothing in the entire document inconsistent with its being organized under either title, and that it complies in all particulars with all the requirements of both titles."

What counsel's purpose is in making a statement like this is beyond our comprehension.

An examination of the Articles of Incorporation adopted by the Company, found at Folio 59 of the record, clearly shows that the Company organized under Title 1 as a railway company. These articles provide that:

"The general nature of its business is to construct and operate railways in the streets and highways of Minneapolis and its suburbs in the County of Hennepin, State of Minnesota."

There is not a word in Title 2 which authorized the formation of corporations thereunder for any such business.

The Articles of Incorporation of the Company in the second subdivision provide that the period of continuance

of the corporation *"shall be fifty years thereafter."* This is as provided in Section 5 of said Title 1. Under Title 2 a corporation had no authority to organize for a period longer than *thirty years.*

Subdivision 7 of the articles of the Company provide that the number and amount of shares of capital stock is twenty-five hundred of *"One Hundred Dollars each."* This is as authorized in said Title 1. Under Title 2 the amount of capital stock is limited, and *must* be divided into shares of *Fifty Dollars each.*

In other words, the Company in its organization has complied with each provision contained in Title 1, which related to its incorporation, and violated every provision of Title 2. If the Company intended and was compelled to incorporate under Title 2 instead of Title 1, it adopted the only method it could to incorporate illegally.

The City asserts that the Company did not specify under which title it organized. This is not necessary. The Duluth Street Railway Company did not so specify, and as stated by the Supreme Court of the State in the cases above referred to, "it is not only not necessary to so state, but in fact makes no difference whether or not it is stated in the charter of a corporation that it organized under Title 1 or 2."

Where it is organized, in fact, is determined by the nature of the business its Articles of Incorporation show it intends to or may engage in.

JUDICIAL CONSTRUCTION BY THE COURTS OF MINNESOTA OF TITLES 1 AND 2.

The Supreme Court of Minnesota has always construed Title 1 of Chapter 34 as authorizing the formation of corporations for the operation of street railways.

In the case of *City of Duluth v. The Duluth Street Railway Company*, 60 Minn. 178, (being the same company whose articles are quoted above) the Court said:

> "The Duluth Street Railway Company is a corporation organized and existing under the General Railroad Laws of this State."

See, also,

State v. Duluth Street Railway Company et al., 76 Minn. 107, *supra;*

Carli v. Stillwater St. Ry. Co., 28 Minn. 373.

The case of *Nash v. Lowry*, 37 Minn. 261, to which counsel for the City make reference, as showing that the St. Paul City Railway Company was not organized under Title 1, shows that Company *was* organized under Title 1, and in deciding that case, the Supreme Court of the State assumes that there is no question about its right to so organize. At page 262 the Court said:

> "An act of the legislature in February of that year, (Sp. Laws, 1872 c. 112,) assumed to declare the persons so accepting with some others, a corporation under the name of the 'St. Paul Street Railway Company,' and to confirm and vest in said corporation the rights specified in said ordinance. The persons named in the act, or a majority of them, organized under it, and thereafter assumed to be and did business as a corporation under said act by said name, and exercised the rights specified in said ordinance. In 1877 a mortgage upon all its franchises and other property, executed by said St. Paul Street Railway Company, was foreclosed by action, and the mortgaged property sold, and in October of that year the purchaser at

> the foreclosure sale, with others, assumed to organize, under Laws of 1876, c. 30, as a corporation by the name of the 'Saint Paul City Railway Company' and in October, 1878, the district court, in which such foreclosure was had, by its final decree vested the title to the franchises and property mortgaged and sold in the Saint Paul City Railway Company."

Said Chapter 30 of the Laws of 1876 is an amendment to Title 1 of Chapter 34, now under consideration, and authorized the reorganization of any corporation owning and operating railway lines which had mortgaged its property and where such mortgage had been foreclosed. There is no provision made in the statutes of Minnesota for mortgaging the property and franchises of a corporation operating a street railway, except such as is contained in the general law relating to railroads.

In the case of *Brown v. Corbin,* 40 Minn. 508, the Court was called upon to determine, among other things, whether a certain corporation was legally organized under Title 2. The Court said in that case in distinguishing the class of corporations to be organized under Title 2 from those authorized to organize under Title 1:

> "The kinds of business specifically enumerated (In Title 2) bear no common analogy to each other, except that they are all for pecuniary profit, and of a strictly private character as distinguished from those to be carried on by quasi public corporations authorized to exercise the right of eminent domain. Evidently the expression 'or other lawful business' was added as a sort of a catch all, for the purpose of including any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration."

We think it is a correct conclusion to state that "other lawful business" is confined to corporations engaged in a business of a strictly private character, as stated by the Court.

PRACTICAL CONSTRUCTION OF TITLE 1.

The executive officers of the State, whose duty it is to receive and file Articles of Incorporation, provided the statutory requisites have been complied with, have always construed said Title 1 of Chapter 34 as authorizing the formation of corporations thereunder for the purpose of owning and operating street railways.

Counsel for the City, in their brief, at page 72, assert that no lawyer of the State before this time, has ever assumed or believed that Title 1 authorized or permitted the organization of corporations thereunder to operate street railway lines.

It appears from the Secretary of State's office that more than twenty different corporations have been organized in Minnesota for the purpose of owning and operating street railway lines. We have set forth in the appendix of this brief certified copies of the Articles of Incorporation of some of these companies. These articles are all similar in form and nearly identical with those of this Company.

The Articles of Incorporation of the Winona Street Railway Company were prepared, as the articles themselves show, by Thomas Wilson, who was one of the Commissioners appointed by the Legislature of the State to, and who did, revise the Laws in 1866. His appointment appears in the preface at page 4 of that revision; and when he prepared the Articles of Incorporation of the Winona Company, he evidently understood that Title 1 authorizd the formation of such corporation thereunder.

The records of the Secretary of State's office show that, with one exception, no lawyer of the State who has ever taken part in the organization of such a corporation acted upon the belief that it could be organized under any other than said Title 1.

In some states such corporations have always organized under a Commercial Railway Act, and in others corporations organized to operate street railways are considered the same as corporations to operate commercial railways.

Cook in his work on Corporations, 6th Edition, at Section 915, says:

> "Where there is no statute in a state relative to the powers of *street railroads*, the courts hold that they have generally the same powers that are given by statute to steam railroads."

In 15 Cyc. 574, the author says:

> "Corporations organized under general laws have all the powers of condemnation granted by such general laws or by the statutes of the State. This doctrine has been held to apply to electric railways, to horse railways in a city, and to street railways generally, and the general statutes relating to the organization of telegraph lines and their power to condemn lands has been held to apply to telephone companies."

Chap. 140 of the General Laws of 1850, State of New York considered in the following cases reads as follows:

> AN ACT TO AUTHORIZE THE FORMATION OF RAILROAD CORPORATIONS AND TO REGULATE THE SAME.
>
> SECTION 1. Any number of persons, not less than twenty-five (25), may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property.

In the case entitled *In the Matter of the Proceedings by the Washington Street Railway Company*, 115 N. Y. 442, the Court said:

> "Corporations for transporting passengers or freight by horses as a motive power over railroads in the streets of cities in this state, except the City of New York, may be formed under the general railroad act

of 1850 (Chap. 140, Laws of 1850) and its amendments. * * *

"The fact that said action of 1850 contains provisions which can only be applied to railroads using some other motive power than horses, furnishes no argument against the application of its other sections to horse railroads.

"The uniform recognition on the part of the officers of the state government, of the right to file articles of association of street railroad companies under the general railroad act of 1850, and of the legality of this kind of corporations thus formed, is very considerable, if not controlling weight in the interpretation of said act."

In *City of Rochester v. Rochester Ry. Co.*, 182 N. Y. 113-115, the Court says:

"In 1862 the Rochester City & Brighton Railroad Company was incorporated under the *General Railroad Act of 1850* (Ch. 140) for the purpose of operating a *street railroad* on certain streets in the City of Rochester extending into an adjoining town. The statute authorized the incorporation under it of street surface railroad companies. *(Matter of Washington St. A. & P. R. Co., 115 N. Y. 442.)* This proposition was never questioned till the decision of this Court in *Matter of New York Cable Company v. Mayor, etc., of N. Y.*, 104 N. Y. 1, and, in fact, most of such companies outside of the old City of New York were organized under that statute. Whatever doubts were cast upon the application of the General Railroad Act to street railroads by the opinion in the *Cable Company* case were removed by the decision in the *Washington Street* case, where the remarks in the earlier case were expressly retracted. By the General Railroad Act plenary power was given to any railroad company incorporated under it to lay out and construct its road between the termini mentioned in the articles of association, except that subdivision 5 of Section 28 provided that the statute should not be construed to authorize the construction of any railroad upon, along

or across any streets in any city without the assent of the corporation of the city. It was, therefore, necessary for the construction of any street railroad within a city that the company should obtain the consent of the city to the use of the street. The City of Rochester by an ordinance consented to the construction of the proposed railroad. It exacted by that ordinance compliance with the terms and conditions which appear in Judge Gray's opinion. The road was built, the company failed, and its road and franchise were sold in 1868 under a foreclosure, the purchaser at which conveyed to a new company bearing the same name, also organized under the General Statute of 1850. In 1869 the new company represented to the Common Council that the terms of the ordinance under which the road was built and being operated were too onerous and asked for relief. Thereupon the Common Council passed a new ordinance, the most material points of which were that the fare for children was fixed at three cents, and the company was relieved for the term of five years from its obligation to contribute to the expense of the repavement or improvements of the streets, though it was required to keep the space between its tracks and one foot additional on each side in good repair. Both parties sought the action of the Legislature, and the statute of 1869 was passed. Now, let us see what were the rights of the parties at the time of the enactment of this statute. The Company had, by the construction of the railroad by its predecessor, under the consent of the Common Council, and its own purchase on the foreclosure, acquired a valid franchise to operate its railroad. It is not necessary to determine what was the effect of the conditions attached by the City of Rochester to its consent. If there was no authority to impose those conditions, nevertheless the consent was effective and the franchise valid."

This doctrine is reaffirmed.

In *Matter of Brooklyn, Q. C. & S. R. R. Co.*, 185 N. Y. 179-180.

In 10 Am. & Eng. Ency. of Law, 1079, the author says:

> "Like an ordinary railroad, a street railroad is of a quasi public nature, and its use a public use. It is a common carrier of passengers, and the right of eminent domain may be exercised in its behalf in order to secure a right of way."

THE CONSTRUCTION AND OPERATION OF STREET RAILWAYS IS A "WORK OF INTERNAL IMPROVEMENT" WITHIN THE MEANING OF SECTION 1 OF SAID TITLE 1. THE LEGISLATURE OF MINNESOTA HAS SO DECLARED IN PARAGRAPH 2841 OF THE 1905 COMPILATION; THIS BEING A PART OF SECTION 1 OF SAID TITLE 1, WHICH READS AS FOLLOWS:

> "Corporations may be organized for the construction, acquisition, maintainance or operation of any work of internal improvement, including *street railways*, etc."

The Supreme Court of Minnesota, in the case of *Rippe v. Becker*, 56 Minn. 100, gives an exhaustive review of the term "works of internal improvement" and sums up its conclusion on that subject as follows:

> "If it (the enterprise) is for public use subject to legislative control and regulations, it would seem to come within the meaning of the words 'internal improvement.'"

It seems unnecessary to state that a street railway is an enterprise for public use and is subject to legislative regulation and control. In fact, any corporation operating railways has no right upon the streets of a city if the operation of such lines of railway is not for public use and in aid of the traveling public, as has frequently been decided by the

Supreme Court of Minnesota, as well as other states in the Union.

See:

Carli v. Stillwater Street Railway Company, 28 Minn. 373;
Gundlach v. Hamm, 62 Minn. 42.

In *Attorney General v. Pingree*, 120 Mich. 550, a street railway is held to be a "work of internal improvement." The Court said:

> "Act No. 338, Local Acts 1899, purporting to empower a commission to be appointed by the common council of the City of Detroit, to acquire for the city, and maintain and operate in its behalf the system of street railways which lies partly within and partly without the corporate limits and comprises over 140 miles of track, is void under article 14, Sec. 9, of Constitution, prohibiting the State from being a party to or interested in any *work of internal improvement*, the operations contemplated by the act being of sufficient magnitude to constitute internal improvements, and the legislature being powerless to authorize the municipality to do what the state could not itself do."

In *Bird v. Common Council of City of Detroit*, 5 St. Ry. Reports 456, it was held:

> "A street railway is an internal improvement under Section 9, Article 14 of the Constitution of Michigan, which provides that the state shall not be a party to or interested in any work of internal improvement."

The Supreme Court of Minnesota holds that a telephone is a "work of internal improvement" in the case of *Northwestern Telephone Company v. Milwaukee Road*, 76 Minn. 345.

That a suburban railway company is a "work of internal improvement" is decided by the Supreme Court of Minnesota in the case of *Minneapolis & St. Paul Suburban Railway Company v. Manitou Forest Syndicate*, 101 Minn. 132.

In the case of *Minnesota Canal & Power Company v. Pratt,* 101 Minn. 214, the Supreme Court said, at pages 212 to 214:

> "The power of eminent domain is not given to public service corporations eo nomine. Certain corporations organized to serve the public are given the right to exercise this sovereign power as the agent of the state. What have become known as 'public service corporations' are organized and exist under the authority of the state to serve the public, by supplying the people on equal terms and for a reasonable compensation with services or commodities and articles which, because of their nature, location, or manner of production and distribution, can be best produced and distributed by some organized form of enterprise operating under state control.
>
> The statutes do not define public service corporations, although the Revised Laws of 1905 carry the name as the heading of Section 2841, which authorizes the organization of corporations for the specific purposes therein enumerated. The power of eminent domain is specifically granted to the corporations which may be organized under this section of the statute, and in that statute the state reserves a power of control which it would unquestionably have by the common law, because of the nature of the business in which such corporations are authorized to engage. That business is such that property of all corporations organized thereunder becomes affected with a public use, and is therefore subject to public regulation and control. The corporations which may be authorized under Section 2841, R. L. 1905, are such as fall within the ordinary conception of a public service corporation. * * *
>
> Railway corporations were recognized as public service corporations and granted the right of eminent domain in this and other states, long before there were any statutes to regulate the conduct of their business or to fix the rates which they might charge. *Street car companies, telegraph and telephone com-*

panies, and gas and electric light companies, were recognized as public service corporations and given the power of eminent domain under similar conditions. All such corporations are nevertheless public service corporations, and because of the nature of the business in which they are engaged and the fact that they have been granted the power of eminent domain, are subject to reasonable state and municipal control whenever circumstances arise which require such control."

See, also,

Blair v. Company, 111 U. S. 366;
State v. Froelich, 115 Wis. 32.

If there ever was any question or doubt as to whether the company was organized under Title 1, Chapter 34, it seems to us this is all removed by Chapter 62 of the Laws of Minnesota for the year 1881, Extra Session, which reads as follows:

"Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That in any case where there has been heretofore an attempted formation and organization or renewal of any corporation under any of the General Laws of this State, and the persons so attempting to form or organize or renew any corporation have actually adopted, signed and filed in the office of the Secretary of State articles of association in which the business specified to be carried on by them as such corporation was such as might be lawfully carried on under said laws, and have, in fact, proceeded as such corporation under the corporate name assumed by them to transact and carry on such business, and in the pursuit thereof have in good faith received and transferred by conveyance to or from such body corporate in such corporate name any property, real or personal; such attempted formation and organization

or renewal in each and every such case is hereby legalized and declared a valid and effectual formation and organization or renewal of a corporation under the names assumed from and after the time of the actual filing, as aforesaid of such articles, notwithstanding the omission of any other matter or thing by law prescribed to be done or observed in the formation, organization or renewal thereof; and any and all conveyances of property, real or personal, in good faith and lawful form made to or by any such body in the corporate name so assumed are hereby legalized and declared as valid and effectual for the purposes intended thereby as if such body corporate had been originally, in all things, duly and legally incorporated. *Provided,* That no such corporation, nor any of the acts or doings thereof shall be or are hereby validated unless such so-called corporation has filed in the office of the Secretary of State and also in the office of the Register of Deeds of the county in which is the principal place of business of said corporation its articles of incorporation.

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved November 18, 1881."

Also by Chapter 229 of the Special Laws of Minnesota for the year 1879, which reads as follows:

"AN ACT TO CONFIRM THE GRANT OF THE CITY OF MINNEAPOLIS TO THE MINNEAPOLIS STREET RAILWAY COMPANY.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That whereas the City of Minneapolis did by an ordinance entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' passed by the City Council of said City on the ninth day of July, eighteen hundred and seventy-five, and approved by the mayor of said city on the seventeenth day of July, eighteen hundred and seventy-five, and by ordinance passed July third, eighteen hun-

dred and seventy-eight, and amended July eighth, eighteen hundred and seventy-eight, and approved July tenth, eighteen hundred and seventy-eight, grant to the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of said city, with certain rights and privileges in said ordinance particularly set forth; now the said right to construct and maintain said street railway through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said company.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved March 4, 1879."

The Ratifying Act of 1879, above set forth, is complete in itself, and cures any possible defect which may have existed, not only in the passage of the ordinance of July 9, 1875, but also in the incorporation of the Company.

The Company filed its Articles in 1873 and complied with all laws in relation thereto. In Paragraph 2 of the Articles of Incorporation of the Company, it is provided:

> "The time of commencement of said corporation is the first day of July, A. D. 1873, and the period of continuance of said corporation is fifty years thereafter."

On July 9, 1875, the ordinance constituting the contract between the Company and the City was passed; then follows the ratifying act of 1879. This act declares:

> "The said right to construct and maintain street railways through the streets of said city, with the rights and privileges as set forth and qualified in said ordinance, is hereby legalized and granted to said Company."

What rights and privileges as set forth in the ordinance are legalized and granted to the Company? Why, the right to construct and maintain street railways in the streets of the city during the time named in that ordinance. That time

is fixed by the ordinance for and during the term of the Company's charter, which is fifty (50) years. The Legislature declared that this ordinance shall be a valid grant to the Company for and during the term of the Company's Charter, which was then filed with the Secretary of State; and it made no difference whether the corporation should have organized under Title 1 or Title 2. The grant to the corporation is legalized and made valid by this act of the Legislature for the time which it either attempted to or did organize, and not for the time it should have organized.

The words "during the term of its charter" as used in the ordinance cannot be misunderstood; they mean the term of existence specified in the Articles of Incorporation.

See,

Thompson on Corporations, Secs. 172 and 330;
Purdy's Beach, Secs. 47 and 72;
Morawetz Private Corporations, Sec. 318, 2nd Ed.;
Elliott Railroads, Sec. 34, note 3;
Cook on Corporations, Sec. 2.

Ratifying legislative acts are not uncommon. Let us examine the effect of this ratifying act as determined by the courts.

In *Louisville Trust Company v. City of Cincinnati*, 22 C. C. A. 334 (S. C. 76 Fed. 296), the Court said:

> "Whatever doubt may exist as to the sufficiency of the corporate powers of the Cincinnati Inclined Plane Railway Company, prior to the act of 1877, to hold, maintain and operate a street railroad in connection with its inclined plane, or as to the power of the City of Cincinnati to consent to the occupancy of its streets, that defect in power was removed by the act of 1877. In 1885, the City of Cincinnati, by proper ordinance, permitted this very company to use either a cable, compressed air, or electricity as a motive power in the operation of the street car lines covered by these two grants and that known as Route No. 8. The

change was subsequently made from horse power to electricity. Its system of electricity interfered with the operation of a telephone line, whose wires were strung along the same streets. The latter undertook to enjoin the railroad from the use of the single-trolley electrical system as a motive power. The power of the company to hold, maintain and operate a street car line, and the power of the City to authorize it to change from horse power to electricity, was challenged by the telephone company. The Superior Court of Cincinnati, in an opinion found in 23 Wkly. Law Bul. 165, held that, under the act of 1877, this line of railroad from the foot of the incline down to the City, and from the top of the hill to the suburbs, were lines connected with the incline, and were necessary incidents in getting passengers to the place of ascent and descent, and that the change from animal power to electricity was authorized by that act, the Board of Public Works having assented. This conclusion as to the validity of the corporate power of that company to maintain and operate the street railroad with electricity was affirmed upon an appeal to the Supreme Court, though the judgment was reversed upon another question in the case. 23 Wkly. Law Bul. 165; 48 Ohio St. 390, 27 N. E. 890. Whether the act was passed because the corporate power of such companies did not authorize the operation of a street railroad under a steam railroad charter, or to remove a mere doubt, the result is the same. If the charter was insufficient to enable such companies to maintain and operate street railroads or to accept a street grant for such a purpose, or if the power of the City of Cincinnati was not sufficient to enable it to authorize a steam railroad company to occupy its streets with a street railroad, the clear purpose and effect of the act of 1877 was to validate that which had been done in respect to such companies. The power to 'hold,' maintain and operate 'portions' of such street railroads then held by such companies is as clearly granted as is the power to acquire thereafter, by lease or purchase, such parts of other lines as may be necessary

for the convenient dispatch of business. *Cincinnati & S. G. A. St. Ry. Co. v. Cumminsville,* 14 Ohio St. 523, 538."

In *Nash v. Lowry,* 37 Minn. 261, the Supreme Court of Minnesota said:

"The Common Council of St. Paul by ordinance, granted in terms the right to lay street railway tracks in any or all the streets of the City, (with certain exceptions). Subsequently the Legislature 'confirmed and validated' the ordinance. Held, that it is immaterial to the validity of the grant whether the parties to whom the right was granted constituted a corporation, or only a partnership."

Also, that the grant is a contract; and, while the Council could not make such contract without the explicit consent of the Legislature, it became binding upon the City as soon as the Legislature 'confirmed and validated' the ordinance; so that thereafter the Common Council could not rescind or revoke the right so granted."

Morawetz Private Corporations, at Section 20, says:

"The existence of a corporation formed without legislative authority may be legalized by the subsequent assent of the Legislature. For this purpose it is not necessary that an act be passed investing the association with corporate franchises by express terms; but it is sufficient if the Legislature by statute recognizes, and thereby ratifies, the franchises which have been claimed. Thus a statute annexing other territory 'to the Town of A,' by implication makes it a town if it was not a town before. A statute amending the charter of a railroad company legalizes the subsequent existence of the company, though it had originally been formed in violation of the law."

And at Section 319 this same author says:

"Where the Legislature, by statute, recognizes and acquiesces in the existence of a corporation, which was formed by the corporators without the proper authority, it thereby invests the association with the right

of continuing to act in a corporate capacity for the purposes and in the manner that it publicly assumed to act. And if the rights or franchises are conferred upon an association claiming to be incorporated, it thereby becomes authorized to exercise the powers expressly conferred, and such others as the Legislature appears to have imputed to it."

In the case of *Society for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet and Ozias Clarke,* 29 U. S. star page 480, it was held:

"In the record there is abundant evidence to establish the right of the corporation to hold the land in controversy; it is given to them by the Royal Charter of 1761, which created the Town of Pawlet; the society is named among the grantees as 'The Society for Propagating the Gospel in Foreign Parts,' to whom one share is given. This is a plain recognition by the crown of the existence of the corporation, and of its capacity to take; it would confer the power to take the land even if it had not previously existed."

In *Blair v. Chicago,* 201 U. S. 454, this Court said:

"By the use of the words, 'with such rights and privileges as the said Common Council has prescribed,' the Legislature could not have referred to any other action of the Common Council than the passage of the ordinance of August 16, 1858. It thereby recognized the power of the Common Council to pass that ordinance. * * * The Legislature by thereby affirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the Common Council to pass that ordinance under clause nine of Section Four of Chapter Four of the Charter of 1851. In the act of 1859 the Legislature did not assume to fix independently the term for the use of the streets, but affirmed that which the Common Council had authorized the corporators to do, and gave authority to confer future rights by agreement with the corporations."

In *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, the Court said:

> "Further objection is made to this contract upon the ground that it is violative of a general statute of the Territory of Washington, enacted December 1, 1881, authorizing cities, etc., to provide for a supply of water. By the first section of this act all cities are authorized to contract for a term not exceeding twenty-five years with corporations for a supply of water, but section 2 states that before any such contract shall be entered into the terms of the proposed contract shall be submitted to a vote of the taxpayers at a special election to be called by the council after a notice of three weeks. As no such election was held to ratify the contract in this case, it is insisted that the city council was never authorized to enter into it.
>
> We are of opinion, however, that the general act of 1881 was, so far as it applied to the City of Walla Walla, superseded by the charter of November 28, 1883, which provided that the City might enter into contracts for the purpose of supplying its inhabitants with water without any further requirement that an election should be held to ratify such contract. That no such ratification by the electors was intended is also evident from Section 11 of the charter, which enacts that no water works shall be erected by the City without a vote of a majority of its freeholders. The fact that such ratification was required where water works were to be erected, and that no mention was made of a vote where the city contracted with a corporation for such purpose, clearly evinces an intent on the part of the Legislature to permit the City to make a contract for a limited term without appealing to the people for their assent. While the special act is silent with reference to the ratification of contracts to supply water, we think the maxim *expressio unius est exclusio alterius* is applicable, and that it was clearly the intention of the Legislature to supersede the general law in that particular, leaving the general law to stand where it is proposed that the City shall erect and maintain water works of its own."

In the case of *Los Angeles v. Los Angeles City Water Company*, 177 U. S. 558, in construing the effect of an act of California entitled "An Act to Ratify Certain Acts and Ordinances of the Mayor and Common Council of the City of Los Angeles," etc., the Court, at page 575, said:

> "It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the State that the constitution of the State permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the Legislature. This law was part of the contract of 1868 as confirmed by the act of 1870, *and could not be affected by subsequent decisions.*"

We see no escape from the conclusion that this ratifying act of 1879 completely disposes of this portion of the case. The important and controlling question is, Was there a contract for fifty years between this Company and the City under the ordinance of July 9, 1875? This ratifying act of 1879 so declares and seems to settle that question; and that is the only question which arises under the contention of the City that this Company should have organized under Title 2 instead of Title 1.

The City is not in a position to question the corporate period or existence of the Company. Having entered into a contract with it, the City is now estopped from questioning the charter period and corporate existence of the Company, under the policy of our law as declared by the Supreme Court of the State.

In the case of *Columbia Electric Company v. Dickson*, 46 Minn. 464, the Court said:

> "The allegation that the plaintiff was not a corporation was clearly immaterial. The general rule is that

> when a party contracts with a corporation, as such, he thereby recognizes its capacity to contract, and cannot afterwards deny it in that transaction. Mor. Priv. Corp., Sec. 751; Cook, Stocks, Sec. 637; *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229; *French v. Donohue*, 29 Minn. 111 (12 N. W. Rep. 354); *East Norway Lake Church v. Froislie*, 37 Minn. 447 (35 N. W. Rep. 260); *Minn. Gas-Light Economizer Co. v. Denslow, supra*, p. 171. This is the universal rule where third parties or strangers to the corporation contract with it in the transaction of the business for which it was organized."

See, also,

Minnesota Gas Light Economizer Company v. Denslow, 46 Minn. 171;

Theodore L. French et al. v. M. E. Donohue, 29 Minn. 111.

The City since July 1, 1903, the time which it now claims the Company ceased to exist as a corporation and its rights in the streets of the City terminated, has repeatedly ordered and directed the Company to build new lines and extensions of existing lines in accordance with the power reserved to the City in Section 3 of the ordinance of 1875. Some of these resolutions requiring such new lines and extensions are set forth in the bill.

One of these resolutions, found at Folio 41 of the record, was passed by the City on December 23, 1904, and required the Company to build several miles of new lines of railway. It is provided in this resolution as follows:

> "When such lines are constructed the same shall be limited as to time to existing ordinances relating to street railway lines in said City."

What existing ordinances did the City have in view in limiting the time in this resolution?

Again, on April 14, 1905, the City required the Company to build several miles more of new lines, using the same

language as to the period of limitation. (See Folio 42 of record.) Each of these resolutions starts out with the declaration:

> "That the lines hereinafter named are demanded by public necessity and that the Minneapolis Street Railway Company is hereby authorized, directed and required to construct the same."

There is no reserve power in the City to order any new lines or extensions of existing lines in any of the Company's ordinances, except in Section 3 of the ordinance of 1875. Nor is there any ordinance or resolution of the City which fixes any time during which the Company has the right to use the streets of the City for street railway purposes, except the ordinance of 1875, and the City must have been exercising the power and authority reserved to it in this ordinance, in ordering these new lines and extensions, and had this ordinance in view in using this language as to time.

Again, on April 5, 1907, the City Council passed two resolutions, one requiring a new line and the other an extension of an existing line, and made direct reference to Section 3 of the ordinance of 1875, in the assertion of this power. If the City, at the time of the passage of these various resolutions, believed that the right of the Company had terminated in the streets, and the Company had ceased to exist as a corporation, it certainly acted in bad faith toward the Company, in compelling it to expend hundreds of thousands of dollars when the City believed the Company had no further rights, upon or authority to use its streets for the purposes designated in these resolutions. This action on the part of the City brings it clearly within the doctrine of the cases last above cited.

Counsel for the City devote much time and space in their brief in discussing certain regulative measures passed by

the State, from which they conclude that because the Courts have held them not applicable to street railway lines, this shows that only corporations organized to operate commercial railways are authorized to incorporate under Title 1.

These legislative measures, from the very nature of their provisions are confined to *railroads* operated by a corporation for commercial purposes, as distinguished from street railways operated by a corporation to transport passengers along the street. One of these acts is Chapter 13 of the Laws of 1887. This law was enacted for the purpose of protecting employes, engaged in operating a railroad, from the negligence of fellow-servants, because such employes were engaged in a business of an especially hazardous nature. It was a close question as to whether such legislation was constitutional. Its constitutionality could only be sustained on the ground that it applied to a particular class of business, which was very hazardous. This is clearly pointed out by the Supreme Court of the State in the cases of:

Levallee v. St. Paul, Minneapolis & M. Ry. Co., 40 Minn. 249;
Johnson v. St. Paul & Duluth Ry. Co., 43 Minn. 222;
Smith v. St. Paul & Duluth Ry. Co., 44 Minn. 17;
Mikkelson v. Truesdale, 63 Minn. 137;
Schus v. Powers-Simpson Co., 85 Minn. 447.

In the case of *Schus v. Powers-Simpson Company*, the Supreme Court of Minnesota was called upon to determine whether or not the act was applicable to the operation of a logging road owned by a lumber company, where the road was operated solely in the interest of the lumber company as a private enterprise. In that case the Court said:

> "The statute has been before the court repeatedly with respect to its validity and its application to particular servants and employees, and has been sustained,

not as a law applying exclusively to railroad corporations as a class—for, if that were its purpose, it would, as intimated by Judge Mitchell in *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222, 45 N. W. 156, be unconstitutional and void as a class legislation—but as applying to employers whose servants and employees are exposed to the peculiar hazards and dangers incident to the operation of railroads. In that case the court said:

'If a distinction is to be made as to the liability of employers to their employees, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances, and conditions.'

Within the reasoning of that decision, and other cases in this Court (*Smith v. St. Paul & D. R. Co.*, 44 Minn. 17, 46 N. W. 149; *Lavalle v. St. Paul M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260), the test in interpreting and construing this statute is not whether the corporation engaged in operating the railroad was organized as a railroad corporation, but whether the road being operated is a railroad, within the ordinary meaning of the term, in and about the operation of which employes are exposed to those dangers and risks against the consequences of which the legislature intended to provide. * * *

Defendant was not organized as a railroad corporation, it is true; but it is conceded that it is operating a line of railroad equipped with engines and cars, the operation of which, so far as concerns the running of its trains, is identical with ordinary railroads, except that it is in the interests of its own private affairs. Every purpose intended to be subserved by the statute applies to it. Its servants and employes in the operation of its trains are exposed to the same dangers and hazards, if not greater, as employes of ordinary roads; and, to hold that it does not come within the statute, would, in our judgment, be illogical and out

of harmony with the prior decisions of the Court, against the manifest intent of the legislature, and a cramped and unnecessarily restricted interpretation of the law. The mere fact that it is called a 'logging railroad,' and came into existence since the passage of that act, is by no means decisive of the question.

It is a general rule of statutory construction, that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. *McAunich v. Mississippi*, 20 Iowa, 338. And within this rule, even though defendant is engaged in operating a 'logging railroad' only, and exclusively in the interests of its private affairs, and though such railroads were not known at the time of the passage of the statute and consequently not then in contemplation of the legislature, the operation of its road, in respect to the dangers and hazards to which its employees are exposed, brings it squarely within the spirit and purpose of the law; and it must, to effectuate fully the intention of the legislature, be held to be within its scope and operation.

In the case of *Mikkelson v. Truesdale, supra*, it was held that the statute applies to a receiver engaged in operating a line of railroad as the representative of the Court, in the interests of the bond-holders and creditors. We are unable to point out any logical distinction between a receiver engaged in operating a railroad and a lumber company similarly engaged, in so far as applicable to this statute. A like conclusion was reached in *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270, a case involving a similar statute. In *Daniels v. Hart*, 118 Mass. 543, mortgagees in possession of a railroad and operating it were held to be within the meaning of the statute. These decisions are in line with sound reasoning and the spirit and purpose of such statutes. It was held in *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, that the statute did not apply to street railways. But the reasons for the statute do not in any essential degree

> apply to such railways. Employees on such roads are not exposed to such hazards, risks and dangers as are the employees of railroad corporations proper."

From the foregoing it can be readily seen why said Chapter 13 of the Laws of 1887 was held not applicable to the St. Paul City Railway Company by the Court in the case of *Funk v. St. Paul City Railway Company*, 61 Minn. 435, and which is so heavily relied upon by counsel for the City. In that case the only ground upon which the Court held the law was not applicable to the St. Paul City Railway Company was that the nature of its business was such that its employes were not exposed to the hazards of those engaged in operating a commercial railway, and for that reason the law did not apply.

The question whether or not a corporation could organize under Title 1 or 2 has never been considered or held by the Court as a determining factor in the application of said Chapter 13 to any corporation.

As already shown, the St. Paul City Railway Company, the defendant in that case, was reorganized under said Title 1 in 1877; but notwithstanding that fact the Court held the law inapplicable to a street railway as distinguished from a commercial railroad.

So in the case of *Lundquist v. The Duluth Street Railway Company*, 65 Minn. 387, the law was held inapplicable to the street railway lines of that company, although the Duluth Street Railway Company was declared by the Legislature of the State to be incorporated under the General Railroad Law, and the Court had previously decided it was so incorporated.

Counsel for the City also refer to a number of cases outside of the State of Minnesota, which directly or indi-

rectly involve the question of the incorporation and duties of so-called street railway corporations under the statutes of other states.

We can see little advantage to be gained by reference to such decisions unless the language of the statutes under which such corporations were organized is the same as that of the State of Minnesota. None of the cases cited by the City involved the right to incorporate under any particular act such as is in question in this case.

We have carefully examined all the statutes of the states from which such decisions are quoted by counsel, and find that none are at all similar in their provisions to said Titles 1 and 2 of Chapter 34 of the State of Minnesota.

To illustrate, the City lays great stress upon the case of *Milwaukee Light & Heat Co. v. Milwaukee Railway Co.*, 112 N. W. 666, referred to in their brief at page 105.

An examination of this case shows that the Statutes of Wisconsin specifically provide for the organization of companies to operate street railway lines under an independent and separate statute from that relating to any other kind of public service corporations; and corporations operating street railways in that state possess only such powers and are subject to such limitation and restrictions as are imposed by that act; also that corporations for operating street railways in Wisconsin are not vested with the same powers or rights as those organized under the Laws of the State of Minnesota.

Manhattan Trust Company v. Cable Company, 68 Fed. 82, cited by the City at page 43, is a case where the Court was called upon to construe an act which made a judgment against a railroad a lien ahead of an existing mortgage; and the Court held that under the Statutes of Iowa such a law had no application to street railway lines.

In the case of *Massachusetts Loan & Trust Co. v. Hamilton,* 88 Fed. 588, cited by the City at page 46, the Circuit Court of Appeals was called upon to construe a similar statute of the State of Montana, and held that it had no application to street railroads.

In that case, however, the Circuit Court of Appeals holds that the statute under consideration, is broad enough to include the organization of street railways thereunder. The Court said at page 593:

> "The general railroad act of 1873 may be said to have reference only to railroads of commerce, and it is fair to presume that the legislature did not then have in mind the construction of street railways, although sections 1, 2 and 3 authorizing the formation and incorporation of railroad companies, are broad enough to include corporations for the construction and maintenance of street railways."

Under the Statutes of Montana, corporations for the operation of street railways are authorized to incorporate under an act independent of commercial railroads, and their rights and powers are more limited than those of corporations to operate commercial railroads.

Taking each case cited by the City on this proposition, we find that in every instance the laws of the state where such a corporation was organized bear little or no similarity to the laws of the State of Minnesota now under consideration.

It is true, there are many provisions in Title 1 which have no bearing upon street railways; and on the other hand, there are many provisions which relate to corporations organized to operate street railways as well as those to operate commercial railroads. For instance, Title 1 contains certain provisions vesting in the Legislature the power to regulate the method of doing business, to determine and

fix the rates to be charged, the running of trains and cars, which apply both to railroads and to street railways, and corporations operating each.

There are also many provisions in Title 1, which relate to corporations organized to engage in works of internal improvement, other than commercial railroads or street railways, and which have no bearing upon either of the latter class of business, all of which demonstrate the absurdity of the claim that the right to incorporate under Title 1 must be determined by the application of all the provisions of that Title to *every* corporation organized thereunder.

II.

THE CITY'S SECOND PROPOSITION IS, THAT IF THE COMPANY HAD A CONTRACT WITH THE CITY UNDER THE ORDINANCE OF JULY 9, 1875, AND THE SUPPLEMENTAL ORDINANCE OF JULY 3, 1878, AS RATIFIED BY THE LEGISLATURE OF THE STATE IN 1879, UNDER WHICH THE RATE OF FARE COULD NOT BE REDUCED BELOW FIVE CENTS WITHOUT THE COMPANY'S CONSENT, THE COMPANY HAS ABANDONED ALL ITS RIGHTS UNDER THIS CONTRACT BY ACCEPTING THE RESOLUTIONS AND ORDINANCE AUTHORIZING THE CHANGE IN ITS MOTIVE POWER; SO THAT NOW THE CITY HAS FULL POWER AND AUTHORITY TO FIX ANY RATE OF FARE IT DEEMS BEST, AND TO IGNORE ALL THE OTHER MATERIAL PROVISIONS OF THAT CONTRACT, INCLUDING THE RIGHT TO TERMINATE THE COMPANY'S USE OF THE STREETS IN THE CITY FOR STREET RAILWAY PURPOSES SHORT OF THE PERIOD NAMED IN THAT CONTRACT.

It will be noticed that the action of the City herein referred to in relation to the change of motive power is taken in some cases by resolutions and some by ordinances.

The Charter of the City of Minneapolis specifically provides that in all cases where the City is authorized to act by ordinance, it may act by resolution instead of an ordinance upon the same subject.

Said ordinance of July 9, 1875, in Section 1, grants to the Company the right to construct and operate

> "A single or double track for passenger railway lines with all necessary tracks for turn-outs, side-tracks and switches in such streets of said city as the City Council may deem suited to street railways."

This grant is to continue *"during the term of the Company's charter."*

Section 8 of this ordinance provides as follows:

> "SECTION 8. The said company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided that the

charge for carrying a person, including hand baggage, from one point to another within the city limits, whether by one or more lines operated by the same company, shall not exceed five cents on any one line; provided, further, that the City of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the City Council of said city may deem just and reasonable; provided that the city shall not reduce the passenger's fare below five cents, over any one continuous line, and what shall be considered a continuous line may be designated by the City Council of the said city, but that said Council shall not designate any such continuous line to be more than three miles in length."

Section 17 of this ordinance provides that

"Within thirty days from the publication of this ordinance, said company shall file with the City Clerk a written acceptance of the grants hereinabove made. * * * and when so accepted this ordinance shall operate as a contract between the City and said Company."

The publication and acceptance of this ordinance is admitted by the City at Folio 76 of the record.

On July 3, 1878, the City passed a supplemental ordinance, found at Folio 15 of the record.

All the rights and privileges granted in both of these ordinances were subsequently ratified by the Legislature of the state, so that regardless of what the powers of the City may have been to pass this ordinance in the first instance, that question is entirely disposed of by this ratifying act of March 4, 1879.

This ratifying act, which is set forth in full at Folio 17 of the record, is entitled:

"An Act to confirm the grant of the City of Minneapolis to the Minneapolis Street Railway Company."

It names both the ordinance of July 9, 1875, and the supplemental one of July 8, 1878, and states that by the terms of these ordinances, the City did

> "Grant the Minneapolis Street Railway Company the right to construct and maintain a street railway through the streets of said city with certain rights and privileges in said ordinances particularly set forth. Now, the said right to construct and maintain said street railway through the streets of said city with the rights and privileges as set forth and qualified in said ordinances is hereby legalized and granted to said company."

Thus the Legislature of the State made all the terms and provisions of said ordinance of July 9, 1875, with the supplemental one of 1878, its own grant and vested the rights thereunder in the Company, including the right to charge and collect a five-cent fare.

This act of the Legislature ratifying the ordinance of 1875 was not only equivalent to a specifically delegated power to the City to make this contract with all of its provisions, but was also a direct grant from the Legislature of the State on this same subject; and brings this case clearly within the doctrine of "unmistakable legislative authority to enter into contracts," as laid down by this Court in

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558;

Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 369;

Cleveland v. Cleveland City Ry. Co., 194 U. S. 517;

Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529;

Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496,

and reaffirmed, so far as this principle is concerned, in

Home Telephone Co. v. Los Angeles, 211 U. S. 265.

We have already discussed the effect of this ratifying act, and we will not burden this brief with further citations of authorities on the effect of this ratification, beyond again calling the Court's attention to the case of *Nash v. Lowry*, 37 Minn. 261, where the Supreme Court of Minnesota has set at rest this question, so far as Minnesota is concerned, in the following language:

> "When the ordinance was 'confirmed and validated' by the act of 1883 it became as valid and binding as though, when passed, the council had express authority to pass it. From that time the power of the council to recall the rights granted ceased."

The policy of the law in the State of Minnesota regarding the inviolability of contracts is in full harmony with the federal policy. The Supreme Court of Minnesota has always maintained a broad and comprehensive policy on this question. The position of the state on this subject is fully disclosed in the case of *The Northwestern Telephone Exchange Company v. The City of Minneapolis*, 81 Minn. 140, where the Supreme Court of Minnesota said:

> "If the ordinance of 1883 which was accepted by the plaintiff, and large expenditures of money made in reliance thereon, is a contract between the city and the plaintiff, the latter cannot wrongfully, and in disregard of justice or reason, be deprived of its vested rights obtained thereby, without a plain and palpable violation both of the state and federal constitutions.
>
> "That the effect of the first ordinance, and the acceptance and expenditures of large sums of money by plaintiff in reliance thereon, established such contractual rights between the parties, we have no right to question, either upon principle or authority. An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which require the outlay of money and labor, to subserve the public interests of its citizens,

when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured. It is protected by the organic law which forbids the impairment of contracts or interference with vested rights without due process of law. *Cincinnati v. Smith*, 29 Ohio St. 291; *Chicago v. Sheldon*, 9 Wall. 50; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *City Ry. Co. v. Citizens' St. Ry. Co.*, 166 U. S. 557, 567, 17 Sup. Ct. 653; *Cincinnati v. Village*, 36 Ohio St. 631, 634; *City v. Great Southern*, 40 La. Ann. 41, 3 So. 533; *City v. Burlington*, 49 Iowa 144; *Com. v. City*, 97 Mass. 555; *City v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *City of St. Paul v. Chicago & St. P. Ry. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458. These are but a few of the many authorities which clearly enunciate the rule above stated, the reason for which is founded upon the most obvious principles of justice, as well as sound policy and public necessity; for no one would invest his money to further any plan of improvement for his own as well as the general benefit if the rights to the advantages which he as its promoter expects to derive from its success might be destroyed by the uncertain or capricious inclinations of the governing body of the municipality."

It seems clear that we can enter upon the consideration of this branch of the case with the unassailable conclusion that, after the passage of the Ratifying Act of March 4, 1879, the Company had a binding and enforcible contract with the City, under which it had the right to charge and collect five cents for each passenger carried upon its lines, and that the City had no power to reduce this rate below five cents. This Ratifying Act not only confirms the grant to the Company, but also confirms the declaration in the ordinance, that the ordinance, when accepted, shall operate as a contract between the City and said Company during

the fifty-year term specified in the Company's Articles of Incorporation.

The City seeks to avoid the terms of this contract upon three grounds:

First—Using the language of counsel for the City, "That it is only a contract to construct and operate a horse street railway," and the City could not consent to any change of this motive power without the abandonment by the Company of all its rights under this contract.

Second—That when the Company accepted the permission given by the City to change this motive power, it surrendered all its rights under this contract, including the right to maintain passenger railway lines upon the streets of the City during the time named in that ordinance, as well as its right to charge five cents for the transportation of passengers on its lines.

Third—If the first two propositions are not correct, then the City has reserved to itself in the ordinances under which it consented to a change of motive power, the right to reduce the rate of fare to any point it deems best, as well as to change any other material provision of the contract without the Company's consent.

In entering upon the discussion of these propositions, we wish to state that we do not dispute the doctrine that public grants must be strictly construed. That doctrine is elementary; and we shall make no reference to the numerous decisions quoted by the City in support of this principle, beyond stating that the Courts in applying this doctrine, do not close their eyes to justice, nor commit an assault upon common sense; but always seek to discover what is the legislative intent and so construe the act as not to defeat this intention or the purposes of the grant.

As stated by this Court in the case of *United States v. Hartwell*, 73 U. S. 385:

> "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe.
>
> The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It (the legislative intention) must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority, which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such sense, bent neither one way nor the other, as will best manifest the legislative intent."

It is also well settled that when a valid grant is made and accepted, then the intention to abrogate or materially change its terms must be established with equal certainty.

It is equally well settled that when once the grant is clearly made and accepted so that the contract is fixed, then the grant will be so liberally construed as to give full force and effect to the intention of the grantor. That is, the rule of strict construction is limited to the grant itself and does not apply to the secondary provisions necessary to carry out the purposes of the grant. This is the established rule in Minnesota. In *Romer v. St. Paul City Railway Company*, 75 Minn. at page 217 the Court said:

> "We find in these ordinances no express grant to the defendant to maintain the curves and switches in the avenues in question for the purpose of taking its cars in and out of its barn, but the right to do so was given by necessary implication.
>
> "It is true that all public grants, unlike private ones, are construed strictly, and favorably for the grantor, the public. But it is equally true that where a grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, *everything which is reasonably proper and necessary* (not simply convenient) *to effect the essential objects of the grant passes by necessary implication.* Otherwise, the purpose of the grant would be seriously impaired, if not wholly defeated.
>
> "It is practically impossible for the defendant to operate its street railway system without car barns in which to place its cars when not in use, for it would be intolerable to permit them to stand upon the streets. The only practical way to get the cars in and out of its barns is by the use of the usual motive power, and the use of the tracks and curves on the streets adjacent to the barns. It would be a very narrow and technical construction of these ordinances to hold that the defendant was authorized to lay switches and curves for the purpose of getting its cars in and out of its barns only on the streets upon which it was expressly authorized to operate its street railway system."

We will discuss the first two of the City's positions under this subdivision of our brief, leaving the third to be considered in the third subdivision.

Turning to the ordinance of July 9, 1875, we find that the grant made to the Company in Section 1 of that ordinance is the right to *"construct and operate a single or double track for passenger railway lines,"* and this grant is to continue during the term of the Company's charter. It is to be exercised upon such streets as the City Council may deem suited to street railways.

Section 4 of the ordinance provides:

> "The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as said company deems advisable."

This section then provides that

> "No propelling power or *machinery* of any sort shall be used after it shall prove to be a public nuisance."

If it was the intention to make this purely a "horse street railway," why was this proviso added? Certainly it can have no application to animal power, because there is no machinery in connection with that. Then follows the further provision in the same section that the

> "Company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council."

If the City has limited itself to horse power alone, what *other* motive power could it authorize street railways to use?

Said Section 4 further provides that:

> "No locomotive, freight or passenger car, such as are usually run over the general railways of this State for the transportation of freight and passengers, shall be used upon any of said tracks, *unless authorized by the City Council.*"

If it was intended to confine the motive power under this ordinance during its entire period to animal alone, this

provision of the ordinance is meaningless. It seems to us that this language clearly authorizes the Company to use *any other motive power* whenever authorized to do so by the City Council, and the subsequent resolutions and ordinances set forth in the bill, relating to change of motive power were passed by the City under the power and authority here reserved; and the Company is now operating its system of street railway under such consent, and pursuant to the power and authority herein contained.

Section 5 of this ordinance provides that:

> "Said tracks and railways shall be used for the purpose of transporting passengers and freight, and the cars and carriages for that purpose shall be of the best style and class used on such railways in other cities."

If the City cannot consent to any change in the motive power to be used by the Company, so as to meet the development and progress of the City and accommodate the necessity and convenience of the traveling public, under changed conditions, without the abandonment by the Company of all its rights under this contract, then this provision of the ordinance is useless.

Said Section 5 contains the further provision that the Company shall have the right to use its tracks

> "For such purpose as from time to time may be necessary in carrying out any *contract* or *engagement* that may hereafter be entered into by and between the City of Minneapolis and said Company."

The ordinance of July 3, 1878, provides that the Company shall have the right to operate the lines therein designated with animal steam or *other* power.

Taking these various provisions of these two ordinances, which were ratified by the Legislature, it seems to us self-evident that it was the intention of the City to grant the

Company the right to construct and operate a street railway system within the City, upon such streets as the City deems suited for that purpose; and while it was provided that at first these lines should be operated with animal power, it was also clearly provided that whenever the City deemed some other power to be better suited for that purpose, the Company should have the right to operate its lines with such power, whenever the City gave its consent.

COUNSEL FOR THE CITY AT PAGE 195 OF THEIR BRIEF ADMIT THAT THE CITY HAD FULL POWER TO CONSENT TO THE CHANGE OF MOTIVE POWER. THE RATIFICATION OF THESE ORDINANCES WOULD VEST IN THE CITY SUCH POWER IF IT DID NOT OTHERWISE POSSESS IT. IT THUS BECOMES A QUESTION OF CONSTRUCTION, AND NOT OF POWER.

In *Lonergan v. Railway Co.*, 3 Am. Elec. Cases 282, the court says:

> "The act was passed at a time when it was a matter of common knowledge that mechanical devices were being daily discovered, and were practically applied in almost every department of public and private economies. The legislature was cognizant that science and skill were occupying wider and deeper fields of thought and activities, and new discoveries were used wherever and whenever time, money, health and the convenience of the people required them. It would seem, in such a case, to be an inversion of the true intent and understanding of the legislature, to say that all the useful invented appliances of the future should be excluded from public enjoyment, and that the horse or other animal should alone be utilized to propel street cars. The statutes speak of a street railroad in the enacting clause, and in the body of the acts, as street or horse railroads, and this language is sufficiently broad to cover a street railroad, whether the cars are drawn by a horse or propelled by the power of an electric dynamo, and the defendant company is in the legitimate exercise of its charter power in using the same."

See also Thompson on Corporations, second edition, paragraph 309.

Nearly the same contention arose in the case of *Cleveland v. Cleveland Electric & Railway Co.*, 201 U. S. 529, as disclosed by the statement of that case on page 533, where it appears that

> "Prior to March, 1889, the lines of railway of the Woodland avenue and West Side Street Railway Company were operated by horse power, and there came a demand for more rapid means of transit afforded by electrical equipment, and on March 22, 1889, and, it is alleged, to secure such means of transit the City granted to the consolidated company the right to use electricity in operating its entire line of street railroad, as the same then existed, with any and all extensions that might thereafter be made thereto."

This Court said, at page 542, in that case:

> "It is not a question of power, therefore, to pass the ordinances, but of the intention of the City in passing them, and the latter we have sufficiently considered. It is only necessary to add that we do not find uncertainty in them and cannot, therefore, yield to the conclusion deduced from its supposed existence. The situation was plain and the city council met it with a definite and reasonable plan. It must not be overlooked that if the City gave rights it secured benefits and that the rights could not be exercised without large expenditures of money or be of any value unless assured of stability."

In the case of *Blair v. Chicago*, 201 U. S. 400, the Court was called upon to determine a contention similar to the one advanced by the City here. In that case the City claimed that the Company had no power to accept any ordinance for the use of other than animal power, because the Company was limited to the use of animal power in its Charter. The Court said, at page 482:

> "It is contended that the railway companies had no power to accept ordinances for the use of other than

animal power in the operation of railways, because of the titles of the various acts which constituted the charter of the companies, limiting them to the use of animal power, and because of the constitutional provision, which we have referred to earlier in this opinion, providing that no private or local law shall embrace more than one subject, which shall be expressed in its title. We think the intention of the Legislature in this respect was not to confine the operation of the road to animal power, but to incorporate street railway companies as distinguished from steam railways, and to endow them with the rights and privileges named in the acts. Section two of the law (act of 1865) expressly gives the power of amendment in providing that 'it shall be competent for the said common council, with the written consent or concurrence of the other party or parties or their assigns to any of said contracts, stipulations, licenses or undertakings, to amend, modify or annul the same.' We think this grant of power was broad enough to authorize the city to grant and the railway company to accept a changed method of operation of the railways by applying thereto a new and more efficient economical power."

In determining what was the intention of the parties the Court will look into the conditions as they existed and as disclosed by the record; and where the transaction has been made in good faith, and clearly inspired to secure beneficial results, and put both parties in a position where the demands of the City's development and needs can be more adequately supplied, the requirement for the application of the rule of strict construction in all its rigor does not exist; and under such circumstances and conditions the Courts apply the spirit rather than the letter of the rule.

In the case of *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. at page 537, this Court refers to the case of *Clement v. City of Cincinnati*, 16 Weekly Law Bulletin, page 355, and state that the reasoning adopted by the Ohio Court in

that case commends itself to this Court. The decision in the Clement case was rendered by Judge Harmon, a jurist whose reputation is national, and we take the liberty of quoting here in full Judge Harmon's decision. He said:

"The facts appearing by the pleadings and bill of exceptions are these:

In 1872 street railroad route number ten was duly established by ordinance, and a contract duly made with one Henry Lewis for its construction and operation, which contract specified rates of fare, car licenses, etc., for the entire term of the grant. The road was duly built and was being operated on Gilbert Avenue according to such ordinance and contract, when the ordinance complained of was passed. The preamble discloses that 'it has been made apparent that the use of horses for the movement of street cars on Gilbert Avenue is very unsatisfactory, and to some extent unsafe, and the movement of cars necessarily slow; that much inconvenience has been experienced by the people of that portion of the city reached by this line, and that the owners of said line are willing to construct a cable or electric system on said avenue, whereby cars may be rapidly moved by steam or electricity,' and the ordinance grants the owners of such route the privilege of laying the necessary cables or appliances, make some minor changes in the route, and, in consideration of the improved facilities proposed and the great expense involved in providing them, authorizes an increase in the rates of fare, and extends the right to use the street to twenty-five years from the passage of the ordinance.

"The principal question is, whether this ordinance is invalid by reason of the clause of Sec. 2502, Revised Stats., which requires that the municipality 'shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal.'

"It is contended for plaintiff that the effect of this ordinance is to release the owner of route number ten from the obligation to carry passengers at the rates

provided in the original grant. The position of defendants is that the clause of the statutes just quoted was not intended to forbid a modification of the agreement between the city and the grantee of the right to operate a street railroad, but only the voluntary surrender by the city of any of the rights secured to itself or the public thereby.

"That the latter was the evil the legislature had in mind we have no doubt, from the knowledge we have, as members of the community, of the history of municipal affairs, which knowledge forms a part of the intelligence which the court must always exercise in such cases. *Gas Co. v. Avondale*, 43 Ohio St. 267. We should be loth to hold, unless such intention had been clearly expressed by the legislature, that the intention was to prevent the city from making any modification whatever of the terms on which or manner in which street railroads are operated, no matter what exigencies might arise during the twenty-five years which the same statute provides as a proper term for such grants.

"The progress of invention among a people famous for fertility in that regard, especially with respect to rapid transportation, the growth and change of location of population, and the teachings of experience, are apt to make such modifications necessary to accomplish what was intended in the creation of agencies of this kind. In the opinion of the council this has happened in this case, and the evidence shows that the public, whose interests are chiefly involved, are of the same opinion.

"While a modification of the contract might be merely colorable—a pretext for surrendering some right or releasing the other party from some obligation, in which case the court would promptly interfere, it is not charged that such was the case here, and the contrary, if not admitted, appears very clearly, plaintiff standing simply on the absolute right secured by statute.

"In our opinion, the clause of the statute in question was intended to prohibit only the giving away by the city of some right secured to it or the public by the

contract under which street railroads are operated. This certainly is the ordinary import of the term 'release from liability.' It is a mere letting go or relinquishment, and where that is the manifest object of the action of the city it is void, whatever form it be made to assume. But where the manifest object of the city is to discharge its duty to the public, whose trustee it is in this regard, and its action is taken in good faith to that end, and has actually had that effect, the fact that by a strained and unnatural construction it may be said to release a street railroad company from an obligation when it merely changes the terms of the obligation, does not avoid its action. The obligation was to carry passengers by horse power, at a rate of speed necessarily slow, for five cents. It now is to carry them by steam power, at a higher rate of speed, for six and a quarter cents, to be reduced to five cents after ten years. It is not a release but a modification made in good faith for a sufficient consideration, and does not fall within the prohibition of the statute. See as justifying this construction of the statute, *Woodson v. Murdock*, 22 Wall. 35.

"The right of the city to extend the time of its grant to a street railroad company has been settled by the decision in *Harkins v. St. R. R.*, 4 W. L. B. 1126, which we have no disposition to question; and to the argument that the change in the motive power changes this road from a street to a steam railroad we cannot agree, and so it is unnecessary to discuss what the effect of such a change would be. It is the nature of the use, not the motive power, which determines whether a road belongs to one class or the other. When a road is laid in a street, on the surface of the street, because it is a street, and to facilitate the use of the street by the public, it is a street railroad, whatever the means used to propel cars over it."

Judgment affirmed.

Force and Peck, J.J. concur.

In the present case the ordinance of July 9, 1875, clearly authorizes the City to consent to a change of motive power,

and the Company unquestionably had the power to accept such consent and thereafter operate its system of railways with such changed power; and the only question to be determined is the extent and effect of the provisions contained in the ordinances and resolutions authorizing such change.

Counsel for the City state, at page 125 of their brief, and reassert it several times thereafter, that the Company claims it is not limited to the use of any particular motive power under the ordinance of 1875. The Company does not make any such claim.

What the Company has always claimed is this: That under the ordinance of 1875, it was granted full right and authority to construct and operate a system of passenger railway lines on such streets as the City declared to be suited for street railway purposes; that as to the lines named in the ordinance of July 3, 1878, it has the authority to use any motive power which has not been declared to be a public nuisance; and as to all other lines it has the authority to use any power which the City has consented it may use; and which has not proved to be a public nuisance; and that all of the resolutions and ordinances, set forth in the Company's bill, relating to a change of motive power were simply a consent on the part of the City that the Company might substitute such power in place of animal power, under the terms of the ordinance of 1875; and to that extent amounted to a modification of that contract.

Bearing in mind the provisions of the ordinance of 1875, to which we have already referred, relating to motive power, and the purposes for which the street railway lines of the Company may be used, an examination of the various resolutions of the Common Council of the City relative to change of motive power, set forth in the Company's bill, clearly demonstrates that the City never intended to change the

terms of the ordinance of 1875, so far as the rate of fare is concerned; and demonstrates with equal certainty that the Company never intended to, nor has it ever consented to any such change.

The various resolutions passed by the City subsequent to the ordinance of 1875, show that as motive power for operating street railways developed in this country, the City has simply attempted to authorize this Company to keep apace with this development, and to give to the City the advantage of such improved motive power; and that all these resolutions and ordinances relating to the change of motive power, were simply *engagements* or *contracts* entered into by and between the City and the Company relative to the motive power to be used upon said tracks and railways in the City, as authorized in said Section 5 of the ordinance of 1875.

The bill alleges, and it is undisputed in the answer, that the City, during the year 1889 was desirous of having the Company operate certain of its *existing lines* of railway by underground cables; and also to have the Company make a thorough test of electricity as a practical motive power in the operation of street railways. To meet this demand the Company made a proposition to the City, which it accepted, relating to that subject. (See Folios 19 and 20 of the record.)

Following this the City passed the resolution of July 19, 1889, set forth at Folio 21 of the record.

This resolution starts out with the following declaration:

> "*Resolved* by the City Council of the City of Minneapolis:
>
> "That the Minneapolis Street Railway Company is hereby authorized and required to operate in the City of Minneapolis the *part of its lines of street railway hereafter designated,* by underground cable, in connec-

tion with stationary engines, such as are constructed and operated in street railway service upon what are known as cable lines, and to construct and maintain such cable lines in and upon the streets of the City of Minneapolis hereafter mentioned."

Then follows a designation of the lines on which the motive power is to be changed.

The resolution then states:

"*Be it Further Resolved*, That the City Council may designate one of the present street railway lines upon which said Minneapolis Street Railway Company shall experiment with electricity as a motive power, which experimental line shall be put in operation by said company not later than six months after such line has been designated, and when electricity, applied in any form upon such experimental line, shall have proved a practical success, then the said Minneapolis Street Railway Company *may, and when ordered to do so by the City Council, shall*, thereafter, operate electric lines with the power applied in the manner which has proved a practical success on such experimental line upon such *existing horse car lines* as the City Council may designate as suitable for electric street railways."

The City, deeming it necessary to have some additional horse-car lines, proceeds in the same resolution to direct the Company to build these additional lines *as required* in the ordinance of 1875.

The City then designates certain lines to be used as experimental electric lines. This is followed by a clause relating to transfers as follows:

"*And Be it Further Resolved*, That if the said Minneapolis Street Railway Company shall accept the provisions of these resolutions, it shall as soon as the proposed cable lines upon Washington Avenue and First Avenue South shall have been completed and are in operation, issue transfer checks to any passenger on any of its connecting lines who shall pay one full fare, which transfer check shall entitle the passenger so re-

ceiving the same to a continuous passage on any connecting line, provided that no passenger shall be entitled to more than one transfer check for one fare, and provided further that said transfer check shall be used only by the person receiving the same for a continuous passage and shall be used upon the next car departing on the connecting line upon which it is to be used."

The resolution further provided as follows:

"Be it Further Resolved, That all the provisions, conditions and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' and all other ordinances of said city, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines, when not modified by the terms of this ordinance, except where by the conditions of said ordinance the said Minneapolis Street Railway Company is required to pave the street between its rails, it shall also pave that part of the streets on its lines operated by cable and electric power between the tracks.

"It being further understood that nothing in these resolutions contained shall be considered as *granting to said Minneapolis Street Railway Company any exclusive privilege or franchise not heretofore possessed by it."*

Passed July 19th 1889.

Approved July 26th, 1889.

This resolution was duly accepted by the Company. (See Folio 34 of record.)

Following the passage of this resolution and after the Company had demonstrated that electricity could be used successfully as a motive power in the operation of street railways, the City passed the resolution of January 17, 1890, found at Folios 31 and 32 of the record.

This resolution is in part as follows:

"Resolved, By the City Council of the City of Minneapolis:

"That the Minneapolis Street Railway Company be and is hereby permitted and authorized to substitute experimental electric street railway lines substantially similar to the one heretofore constructed and now being operated on Fourth Avenue South, on the conditions hereinafter contained, on the following lines:

"*First*—On the two lines which by the resolutions of the Council passed July 19th, 1889, and approved July 26th, 1889, and by resolution of the Council passed June 29th, 1889, and approved July 1st, 1889, it was authorized and by its agreement made in pursuance to said resolutions it agreed to construct and put in operation cable lines during the year 1890, to-wit: The Washington avenue and First avenue lines.

"*Second*—On any of its *existing horse-car or motor lines where it may desire* and shall make such substitution during the year 1890.

"*Provided* that said Company shall, within thirty days after the passage of this resolution accept the above *permission* and agree to the following conditions," etc.

Under this resolution the Company was authorized to change the motive power to electricity on all of its *existing* lines of street railway in the City. The City reserved to itself the following power in this resolution:

"If at any time on or before April 1, 1891, the City Council shall determine any or all of said electric lines to be unsuccessful or not equal to the cable lines ordered, the Council may order cable lines substituted for said electric lines on Washington avenue and First avenue lines, according to the terms of the previous agreement (to-wit: The Cable Resolution) and may order the discontinuance of electricity as a motive power on any of the other lines that it may see fit."

This resolution contains this important provision, viz.: "The provisions of said resolution of July 19, 1889, and all other ordinances and resolutions of the council shall not be modified or affected hereby except in the particulars above indicated."

This resolution was duly accepted by the Company. (See Folio 34 of the record.)

The City having become satisfied that electricity was a satisfactory and practical motive power in the operation of street railways, passed the ordinance of September 19, 1890, which authorized the Company to use this motive power not only upon all existing lines, but also upon all *future lines and extensions of existing lines.* This ordinance is found at Folio 35 of the record.

It sets forth more fully just what the Company should do in the maintenance and operation of its lines of railway under this substituted motive power. It also contains the provisions of the so-called cable resolutions of July 19, 1889, relating to transfers; changed only so far as it is necessary to make the same applicable to the lines operated by electricity as a motive power. No mention is made anywhere in this ordinance as to the rate of fare beyond the statement that a passenger who has paid one full fare shall be entitled to receive such transfer.

No time is fixed in this ordinance of September 19, 1890, during which the Company may operate such lines of street railway by electricity. The first direct mention of such time appears four years later in the resolution of December 23, 1894, found at Folio 41 of the record, wherein the City, in the exercise of the powers reserved to it in the ordinance of 1875, ordered some new lines, and in that connection stated:

> "When such lines are constructed, the same shall be limited as to time to *existing ordinances relating to street railway lines in said city.*"

We have already pointed out that the resolution of January 17, 1890, provided that the provisions of the ordinance of July 9, 1875, should not be modified or changed, except

in the particulars indicated in the resolutions passed up to that time. Evidently in the passage of the ordinance of September 19, 1890, the City believed that it was not necessary to limit any time during which the Company should operate its lines of railway by electricity as that was already provided for in the ordinance of July 9, 1875, which ordinance it was specifically provided in the resolution of January 17, 1890, should not be modified by the passage and acceptance of that resolution; and the ordinance of September 19, 1890, was merely a consent on the part of the City that as to *future* lines the same motive power could be used as that authorized by the resolution of January 17, 1890, for existing lines and subject to the conditions stated in that resolution which specifically continued the July 9, 1875, ordinance.

Counsel for the City make two assertions in their brief, which they then assume to be facts, and base their whole argument as to this proposition thereon, to-wit:

First—That the ordinance of July 9, 1875, only authorized the construction of a horse railway system, and contained no provisions under which the City could permit the Company to use any other power.

Second—That the ordinance of September 19, 1890, is a new and independent grant subject to revocation at any time by the City, and is the only one passed by the City, under which the Company is authorized to use any other motive power than animal. Both of these are merely assertions of counsel, and are not justified by the facts as disclosed in this record.

As already pointed out in this brief, under the ordinance of July 9, 1875, the Company was not absolutely bound to the use of animal power alone, regardless of what the future

developments or needs of the City might be; nor is the City precluded from consenting to a change in motive power by means of which the Company could operate its street railway lines under and subject to the terms and provisions of the ordinance of 1875.

There are three independent and progressive resolutions on the part of the City, under which it consented that the Company might change the motive power upon its system of street railway lines under the grant contained in the ordinance of 1875. None of these resolutions contain any grant or authority to construct, maintain or operate a street railway system upon the streets of the City. They all relate to a change of motive power on a system already authorized to be constructed and maintained. Each one lacks all of the elements necessary to a new and original grant of power to operate a street railway system.

The first one of these is said resolution of July 19, 1889, and is found at Folio 20 of the record, and begins as follows:

> "*Resolved,* By the City Council of the City of Minneapolis that the Minneapolis Street Railway Company is hereby authorized and required to operate in the City of Minneapolis the part of its lines of street railway hereafter designated, by underground cable."

Then follows a designation of the existing lines which the Company is to thereafter operate by cable power. Nothing is herein contained, which in any way grants to the Company any new right, so far as the construction and operation of a street railway system is concerned.

This action of the Council is based upon the grant which the Company already had under the ordinance of July 9, 1875, to construct and operate a street railway system; and simply provides that it shall operate a portion of its system, authorized to be constructed under that ordinance, by cable

power; and to remove any possible question as to whether any additional rights were granted to the Company under the terms of this resolution, it is provided at the end thereof as follows:

> *"Be it further Resolved* that all the provisions and conditions and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis' and all other ordinances of said City, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines, when not modified by the terms of this ordinance. * * * It being further understood that nothing in these resolutions contained shall be considered as granting to said Minneapolis Street Railway Company any exclusive privilege or franchise not heretofore possessed by it."

How was it possible to make it plainer that the City, by the passage of this resolution, simply intended to authorize the Company to operate certain of its existing lines by a different motive power, and that both the City and the Company understood that the latter had the power and authority to operate such lines with such changed motive power under the ordinance of July 9, 1875.

The City then passed the next resolution relative to change of motive power, being said resolution of January 17, 1890, beginning at Folio 31 of the record. This resolution begins as follows:

> *"Resolved* by the City Council of the City of Minneapolis that the Minneapolis Street Railway Company be and is hereby permitted and authorized to substitute experimental electric street railway lines substantially similar to the one heretofore constructed and now being operated on Fourth Avenue South, on the conditions hereinafter contained on the following lines:"

Then follows a designation of the two existing lines on which the Company had been previously authorized to sub-

stitute cable power under the resolution of July 19, 1889.

Then this resolution of January 17, 1890, further provided:

> "*Second*—On any of its *existing horse car or motor lines* where it may desire, and shall make such substitution during the year 1890."

That is, so far, the Company is authorized to substitute electricity as a motive power upon all of its *existing* lines of street railway, the authority for the construction and maintenance of which is provided for in said ordinance of July 9, 1875.

This permission and authority on the part of the City in the resolution of January 17, 1890, is followed and covered by this very important and significant provision contained in subdivision D of that resolution, and found at Folio 32 of the record, as follows:

> "THE PROVISIONS OF SAID RESOLUTION OF JULY 19, 1889, AND ALL OTHER ORDINANCES AND RESOLUTIONS OF THE COUNCIL SHALL NOT BE MODIFIED OR AFFECTED HEREBY EXCEPT IN THE PARTICULARS ABOVE INDICATED."

This resolution containing this provision last above quoted was duly accepted by the Company. (See Folio 34 of the record.)

The conditions relating to the change of motive power here are in many particulars quite similar to those considered by this Court in the case of *Blair v. Chicago*, 201 U. S. 450, in which it was claimed by the City in that case just as counsel for the City claim here, that by accepting the "power ordinances" the Company lost its rights under existing contracts. There was also a provision in the so-called "compromise ordinance" substantially the same as the one just quoted from the January 17, 1890, resolutions passed by the City in this case.

In discussing this claim of the City in the Blair case, the Court said, at page 482:

> "It is contended that whatever rights would otherwise be included in contracts confirmed by the act of 1865, they were lost to the companies by accepting the privileges conferred in the 'power ordinances' of July 7, 1886, and March 30, 1888. But prior to the passage of those ordinances was the so-called 'compromise ordinance' of July 10, 1883, as amended August 6, 1883, settling certain controversies as to license fees and street paving, and extending the time of operation for twenty years, and further providing: 'But nothing in this section contained, or the acceptance hereof, shall in any manner impair, change or alter the existing rights, duties and obligations of the city, or of said companies, respectively, from and after the expiration of the said term of years hereinbefore mentioned.' In the North Chicago City Railway ordinance and the West Chicago City Railway Company ordinance clauses are inserted to the effect that privileges as to time after the expiration of the term of twenty years are to be governed by ordinances theretofore passed. In view of this reservation we are of the opinion that whatever rights and privileges the company had in the streets after the expiration of the time limitation in the 'power ordinances' were not lost by the acceptance of privileges conferred in those ordinances."

As already stated in this brief, down to this point the City has specifically carried forward and made applicable all the terms and provisions of the ordinance of July 9, 1875, for the operation of its street railway lines by the substituted motive power. Neither one of these resolutions contain any provision which could be construed into a grant of any *new* power or authority to *construct and maintain* a system of street railway lines. All the provisions of these resolutions relate to existing lines the construction and maintenance of which were already authorized under the ordinance of July 9, 1875.

In order to have a new grant the City must use language which amounts to a grant; as stated by this Court in the case of *Blair v. Chicago,* above referred to. Quoting from page 457:

> "The Company must be '*authorized*' by the City Council before it can lay tracks or operate railways in the streets. This is more than to designate that for which authority has already been given. 'To authorize' is to 'clothe with authority' Webster's Dict., 'To give legal power to' Century Dict. It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets."

Under what possible theory can it be claimed that the ordinance of July 9, 1875, has been abandoned or in any way abrogated by the passage and acceptance of these two resolutions of July 19, 1889, and January 17, 1890, or that in accepting those resolutions the Company surrendered any of its rights under the ordinance of July 9, 1875, when by the very terms of this agreement between the Company and the City, under which the City gave its consent to a change of motive power, it specifically provided that such resolutions shall not modify or affect said ordinance of July 9, 1875, except as specified in those resolutions?

There is not a word contained in those resolutions which in any way affects the original grant of the company, to construct and maintain its street railway system during the time and as provided in the ordinance of July 9, 1875, or to in any way change the terms and provisions of Section 8 of that ordinance relating to the rate of fare, except that the Company agrees that it will issue a transfer check to any passenger who has paid one full fare, as provided therein.

These resolutions of July 19, 1889, and January 17,

1890, do not finally complete the arrangement or undertaking between the City and the Company.

Subdivision A of said January 17, 1890, resolution provides that:

> "If at any time on or before April 1st, 1891, the City Council shall determine any or all of said electric lines to be unsuccessful or not equal to the cable lines ordered, then this resolution shall be of no further force or effect, and the Council may order cable lines substituted for said electric lines on the Washington avenue and First Avenue lines, according to the terms of the previous agreement, and may also order the discontinuance of electricity as a motive power on any of the other lines that it may see fit where it is substituted under the terms of this resolution."

This resolution of January 17, 1890, is followed by a third and the last one passed by the City in relation to this change of motive power, which is said ordinance of September 19, 1890, beginning at Folio 35 of the Record.

It is this ordinance, which counsel for the City claim is the only one passed by the City authorizing the Company to operate its street railway lines by electricity as a motive power, and which they assert, on pages 151 and 169 of their brief, is a separate and independent grant.

In considering the purpose and effect of the passage and acceptance of this last ordinance, we must bear in mind all the time, that the City had already given its full and complete consent to the substitution of electricity as a motive power, on all existing lines of street railway in the City; but had reserved the right to discontinue that use at any time on or before April 1, 1891, if the City should determine before that time, that electricity was not satisfactory as a motive power; and further, that the City had not yet given its consent to the change of motive power in the operation of *future lines.*

The language of the ordinance of September 19, 1890, clearly demonstrates that it was passed by the City for the purpose of finally completing the arrangements previously begun with the Company relative to the change of motive power on the Company's entire system of street railway lines, both present and future.

Section 1 of that ordinance provides that:

> "The Minneapolis Street Railway Company, its successors and assigns, are hereby authorized to operate all its existing lines of railway in the City of Minneapolis, and *all its lines hereafter constructed* in said City, by electricity as a motive power."

If the City's contention is correct that this is an original and independent grant, and all the terms and provisions of the ordinance of July 9, 1875, were abandoned, the question arises at once as to what is the meaning of this language:

"And all its lines hereafter constructed in said City."

This ordinance grants no right to construct any lines. Under what authority are these lines to be constructed? Obviously, under the authority contained in the grant of July 9, 1875.

The only authority given by the ordinance of September 19, 1890, is to erect and maintain poles, wires, conduits or other appliances.

"Necessary to operate said lines of railway."

What lines of railway are meant? It seems perfectly clear that *"said lines of railway"* refer to such lines as the Company has already constructed or may thereafter construct under the grant and authority contained in the ordinance of July 9, 1875.

Section 2, which immediately follows this language, clearly so indicates. It reads as follows:

> "All the lines of street railway in the City of Minneapolis heretofore constructed by said Street Railway Company and now in operation, and all new lines and extensions of existing lines heretofore *ordered* by the City Council of the City of Minneapolis, or the building of which *has by ordinance* or resolution of said City Council, *been authorized,* shall be constructed, completed and fully equipped for operation by electricity as a motive power within the time named therein."

This becomes still more self-evident by reference to the resolution of July 19, 1889, where the City, exercising its authority under Section 3 of the ordinance of July 9, 1875, ordered several additional lines to be built. (See Folio 23 of the record, where that portion of said resolution of July 19 appears.)

The question may be asked, Why was it necessary to pass this ordinance of September 19, 1890? The answer to that is plain. At the request of the City, the Company had been experimenting with electricity as a motive power to determine its availability, as required in the resolution of July 19, 1889. Following this test, the City authorized the Company to change its motive power upon all existing lines where the Company could make the change, on or before a certain date; and the City had reserved to itself, pending its final determination of the successful use of electricity as a motive power, the right to order its discontinuance any time on or before April 1, 1891.

Nine months after the passage of the resolution in which it had reserved the authority to discontinue the use of electricity, the City became satisfied that it could be successfully and satisfactorily used as a motive power, and then abandoned its right to order the discontinuance of its use; and gave consent to its use, not only on *existing* lines, but on all *future* lines that the Company might build under the

ordinance of July 9, 1875. This is the reason why this ordinance was passed on September 19, 1890.

This last ordinance provides more in detail as to how this new motive power shall be used and adopted; for instance, Section 1 provides for the erection of poles and specifies where they shall be placed, and the manner of stringing the wires thereon; and in this connection states that "the company may locate and erect poles or other appliances as may be necessary to operate *said lines of railway* by electricity." There is no authority preceding this to *construct and maintain* any lines of railway, excepting such lines as the Company has already constructed, or may thereafter construct, under the ordinance of July 9, 1875.

Section 3 provides the manner in which such necessary appliances shall be installed and the speed at which the cars shall be run when operated by this new power.

Section 4 provides that not more than two cars shall be attached together to be run upon said lines, excepting by consent of the Council, and provides for "guards" to be placed on these cars; while Section 9 is significant in its phraseology and reads as follows:

> SEC. 9. The said Street Railway Company shall hold the City of Minneapolis harmless from all damage of any kind whatsoever which may be caused by the work of construction in connection with putting up or maintaining poles or electric wires for said electric street railway lines, or which may be caused by reason of said poles and electric wires being placed and maintained as herein authorized."

This section relates wholly to the *appliances* to be used by the Company in connection with this new power; such as poles and wires, and makes no reference to nor contains any provisions for holding the City harmless from damage caused by the *construction of any street railway lines.*

Clearly showing that the City at that time did not understand that it was granting the Company any right to construct street railway lines, but simply giving the Company the right to install such appliances as were necessary to operate its street railway lines, theretofore authorized to be constructed under the 1875 ordinance.

Now, if this September, 1890, ordinance was intended to be a new and independent grant to construct, maintain and operate street railway lines upon the streets of the City, and was intended by the City to supersede the ordinance of July 9, 1875, it certainly would have been made full and complete on all those subjects necessary to such a grant. The time during which such right and authority might be exercised by the Company would have been named. The terms upon which the authority might be exercised, would have been specified. The rate of fare the Company might charge would have been named, and nothing would have been left to any *existing* ordinance. But there is no provision in the September, 1890, ordinance relating to any of these subjects. All are left to the ordinance of July 9, 1875. Only such regulations are provided for as relate to the *use* of this substituted motive power.

Some of the essential and vital elements of a grant of this nature contained in the 1875 ordinance and which are wholly omitted from the ordinance of September 19, 1890, if it is to stand as a new and independent grant, as claimed by the City, are as follows:

(1) The time during which such grant may be enjoyed. This is fixed in the July 9, 1875 ordinance.

(2) The power of the City to require the construction of additional lines, or the extension of existing lines. This is provided for in Section 3 of the 1875 ordinance.

(3) Provisions requiring the Company to allow any other Street Railway Company to connect with and use its lines, in case such new company shall be authorized to do so by the City Council; and also for forfeiture of any rights of the Company in case it does not comply with the terms and provisions of the grant; all of these are specifically provided for in Sections 3 and 4 of the 1875 ordinance.

(4) The purpose for which the tracks may be used and the manner of their use, together with the requirement that they shall be lowered or changed so as to meet any change of grade which the City may make in the streets; and the terms and conditions upon which those changes shall be made. These are provided for in the 1875 ordinance.

(5) All provisions relative to holding the City harmless by reason of any damage which may result to the Company, from the use of public utilities by the City, such as water mains, gas pipes, etc., that the City might own, and operate. These are provided for in the ordinance of 1875.

(6) The rate of fare which the Company may charge for the transportation of passengers on its system. This is provided for in the ordinance of 1875.

(7) The character of the service which the Company shall furnish and the method by which this may be regulated by the City. This is provided for in the ordinance of 1875.

(8) The terms and conditions upon which the Company may use bridges constructed by the City, and what portion of the maintenance expense thereof the Company shall bear. This is provided for in the ordinance of 1875.

(9) All of the police regulations, which are usually specified in a grant of this character. All these are provided for in the ordinance of 1875.

If we treat the resolutions of July 19, 1889, January 17, 1890, and ordinance of September 19, 1890, as only modifications of the ordinance of July 9, 1875, as they are evidently intended to be, then all these essential requirements of a grant are provided for as follows:

First—In the resolution of July 19, 1889, it is provided as follows:

> "*Be it Further Resolved*, That all the provisions, conditions, and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance Authorizing and Regulating Street Railways of the City of Minneapolis,' and all other ordinances of said city, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines, when not modified by the terms of this ordinance, except where by the conditions of said ordinance the said Minneapolis Street Railway Company is required to pave the street between its rails, it shall also pave that part of the streets on its lines operated by cable and electric power, between the tracks.
>
> "It being further understood that nothing in these resolutions contained shall be considered as granting to said Minneapolis Street Railway Company any exclusive privilege or *franchise* not heretofore possessed by it."
>
> Passed July 19th, 1889.
>
> Approved July 26th, 1889. (See Fol. 26 of the Record.)

Second—In the January 17, 1890 resolution, it is provided as follows:

> "D. The provisions of said resolution of July 19th, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby except in the particulars above indicated." (See Fol. 32 of the Record.)

Third—In the September 19, 1890 ordinance, it is provided as follows:

"SEC. 8. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An Ordinance authorizing and regulating Street Railway in the City of Minneapolis,' passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable." (See Fol. 38 of Record.)

Taking these three provisions, together with the conditions surrounding the passage of the three respective resolutions or ordinances, in which they are contained, it seems to us that but one conclusion can be reached; and that is that it was the intention of the City that all of the terms and provisions of the ordinance of July 9, 1875 should remain intact, and apply to the rights of both parties, excepting only in so far as they are expressly modified or changed by the provisions of those resolutions and ordinances.

Taking the question of time during which the Company might use the streets, one of the most vital provisions, so far as both parties are concerned, and no mention is made as to this in either of said resolutions or ordinance; but the City fourteen years later, when ordering several miles of new lines, declared that:

"When such lines are constructed, the same shall be limited as to time to existing ordinances relating to street railway lines in said City." (See Fol. 41 of the Record.)

A year later the City orders several miles more of new lines, and in the resolution ordering such lines provides that:

"When such lines are constructed, the same shall be limited as to time to existing ordinances relating to street railway lines in said City." (See Fol. 42 of the Record.)

What more conclusive proof can we have that the City understood that the provisions of the ordinance of July 9, 1875, so far as they related to the time during which the Company should enjoy its grant, were still in force fourteen and fifteen years later than the passage of the last of the said resolutions and ordinances? For there is no ordinance or resolution in existence, nor was one ever passed by the City, which fixed the time the Company might exercise its authority to operate street railway lines in the City, excepting the ordinance of July 9, 1875.

Take the very important provision, under which the City may order new lines or the extension of existing lines, and we find the City on December 23, 1904, ordering many miles of new lines, and on April 14, 1905, ordering several miles more of new lines. Again, on April 5, 1907, ordering the Company to build new lines; and in each resolution in which the City directed the Company to build such new lines and extensions, the City either uses the identical language contained in said ordinance of July 9, 1875, or makes direct reference to that ordinance by date and year. (See Fols. 41 to 43 inclusive of the Record.)

The only ordinance in force, under which the City has any power or authority to order such new lines, is that of July 9, 1875, wherein, at Section 3, it is provided:

> "The City Council may at any time designate any other line of railway in the said city as a line demanded by the public necessities, and may also designate an extension of any existing line or lines."

The resolution of December 23, 1904, and the one of April 14, 1905, start out with the statement that "The lines hereafter named are demanded by public necessity." The exact words contained in Section 3 of the ordinance of July 9, 1875.

Both said resolutions of April 5, 1907, also begin with the same statement; and the City in each of said last two named resolutions directs the Company to build the lines therein designated

> "As provided in Section 3 of that certain ordinance passed by the Council on July 9, 1875."

What more complete demonstration can we have that the City claimed, at the time these resolutions were passed, that the provisions of the ordinance of July 9, 1875 were still in force?

Taking the question of the rate of fare, perhaps the most vital and important part of a contract or grant to operate street railway lines, the resolutions and ordinance relating to change of motive power make no provision whatever as to rate of fare, except that in the resolution of July 19, 1889, it is provided as follows:

> "*And be it Further Resolved,* That if the said Minneapolis Street Railway Company shall accept the provisions of these resolutions, it shall assume as soon as the proposed cable lines upon Washington avenue and First avenue south shall have been completed and are in operation, issue transfer checks to any passenger on any of its connecting lines who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on any connecting line, provided that no passenger shall be entitled to more than one transfer check for one fare, and provided further that said transfer check shall be used only by the person receiving the same for a continuous passage and shall be used upon the next car departing on the connecting line upon which it is used." (See Fol. 25 of Record.)

The resolution of January 17, 1890, makes no direct mention of this transfer provision; but subdivision D, as shown at Fol. 32 of the record, declares that

> "The provisions of said resolution of July 19, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby, except in the particulars above indicated."

Thus carrying over into this resolution the provision last above quoted from the July 19, 1889 resolution.

Said ordinance of September 19, 1890 contained the following provision, as shown at Fol. 37 of the Record:

> "SEC. 6. Passenger cars on all said lines shall run between extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change to passengers traveling there on and after November 1st, 1890, said Street Railway Company shall issue transfer checks at the junction of said lines, at Washington and Hennepin avenues, to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle passenger so receiving the same to a continuous passage on either of said connecting lines provided that no passenger shall be entitled to more than one transfer check for one fare, and provided further, that said transfer check shall be used only by the person receiving the same for a continuous passage and shall be used on the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest to the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues."

What is meant by the words "One full fare?" It must mean something. If, as claimed by counsel for the City, the ordinance of July 9, 1875, so far as it relates to the rate of fare, is no longer in force, how or where shall we ascertain what is "One full fare?" It is not provided for or named in this ordinance or any of the preceding resolutions.

If, as now claimed on behalf of the City by its counsel,

it was intended to abrogate the provision of the ordinance of July 9, 1875 as to rate of fare, why did the City at the time these resolutions and ordinance were passed, *leave it to the terms of that very ordinance to fix the rate of fare?*

It seems to us self-evident that the position which counsel for the City now take, is directly in conflict with the facts and wholly untenable and unjustifiable.

In addition to their assertion that this ordinance of September 19, 1890 is a new and independent grant, counsel for the City at page 150 of their brief also claim that it is not a contract, because the City had no power or authority to make such a contract; and for that reason it is a mere revocable license. That is, the Company surrendered all of its contract rights under the 1875 ordinance in exchange for a mere revocable license, and assumed the obligation to expend many millions of dollars in changing the motive power.

This claim on the part of the City is based on the assumption that the provisions, which we have quoted from the resolutions and ordinance relating to change of motive power, do not continue, or have reference to the provisions of the 1875 ordinance, relating to the rate of fare, duration of the grant, or other provisions favorable and necessary to the Company's rights; in fact to its very existence; and the City follows this assumption with another, to the effect that these same provisions do continue and make applicable to the Company all those provisions of said 1875 ordinance, which are favorable to the City.

Under just what line of reasoning or principle of law the City reaches the conclusion that these provisions of the resolutions and ordinance make applicable to the Company all the terms and provisions of the ordinance of 1875, which are burdensome to the Company and beneficial to the City;

and discard and abandon those which are vital to the Company's existence and the successful prosecution of its business, we are unable to discover from their brief.

But taking counsel's assertion on this subject and applying it to Section 8 of the 1875 ordinance, then it necessarily follows that Section 8 is continued in force. That section is a *limitation* on the right of the Company as to the rate of fare it may charge. The language is:

> "The said Company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines or railway as it may deem proper; provided that the charge for carrying a person, including hand baggage, from one point to another within the city limits, whether by one or more lines operated by the same company, *shall not exceed five cents on any one line.*"

In *Detroit v. Detroit Citizens Street Railway Company,* 184 U. S. at page 389 this Court held language similar to this to be a *limitation* on the powers of the Company, to the extent that the Company could not charge to exceed that sum; *and was also a contract under which the City could not reduce the fare below five cents.*

Counsel refer to the case of *Knoxville Water Co. v. Knoxville,* 189 U. S. 434, as supporting their claim. We have carefully read this case, and can find nothing in it which supports any such contention.

Most of the authorities cited by the City on this branch of the case are fully considered by the Circuit Court of Appeals in the case of *Omaha Water Company v. City of Omaha,* 147 Fed. 1, in which case Judge Sanborn, in an exhaustive opinion, points out their inapplicability to a case like the present; and if it were not for the length of that opinion we would feel compelled to quote it in full in this brief.

It seems to us that one of two things must be true. Either all the terms and provisions of the ordinance of July 9, 1875 are in force as modified by these resolutions and ordinance relating to motive power, or none of them are in force.

As already stated, the City has relied on and exercised its rights under some of the provisions of the 1875 ordinance since the passage of these motive power resolutions; and compelled the Company to expend many millions of dollars in obedience to the terms of the 1875 ordinance.

Under such circumstances, it ill becomes the City to now assert that that ordinance is no longer in force.

In connection with this proposition, counsel for the City refer to the case of the *People's Gas Light & Coke Company v. Chicago,* 194 U. S. 1, as sustaining their contention.

The primary question involved in that case was, whether or not certain contract rights and exemptions possessed by one corporation and confined to a certain territory of the City, passed to a consolidated company, which took in several other corporations covering additional territory, and which latter corporations did not possess such contract rights or exemptions.

While this Court did not decide what were the rights of the Company, so far as the territory embraced within the exemption and contract rights was concerned, the Court did hold that these contract rights and exemptions were not extended by the consolidation to other companies and new territory.

Another question came into that case as to the effect of the prohibition contained in the amendments to the Constitution of the State of Illinois, which were enacted after the rights and exemptions were given to the original company, but before the consolidation.

Counsel for the City, at page 168 of their brief, in commenting upon that case state:

> "It will be seen there was an attempt on the part of the Gas Company to extend the restrictions of the original contract to subsequent territory in which it, by consent of the City, laid mains.
>
> "This claim on the part of the Company was denied by this Court. In effect, that is precisely what is being claimed here by the complainant. It had a contract right, under the original ordinance of July 9, 1875, confirmed by subsequent act of the Legislature, with reference to the construction and operation of a horse street railway line."

Counsel then proceed to argue that that contract is not continued by the provisions of these resolutions and ordinance relating to change of motive power.

This statement indicates that counsel seem neither to understand our claim nor the scope of the July 9, 1875 ordinance.

It is true that we do claim under said ordinance we have a contract with the City, but that contract covers more than the mere construction and operation of a *horse* street railway. It is a contract under which the Company has the right to construct and operate a street railway system, and to use thereon *any* motive power which it and the City may agree upon.

The City, by the terms of that ordinance, granted the right to the Company to construct and maintain its street railway system. The Company accepted this grant, and there was no need of any additional grant from the City relative to that particular subject. The *power* which should be used thereafter upon such lines is such as the City may *consent* to; and these subsequent resolutions and the ordinance relating to the motive power, were passed by the City, not for the purpose of granting the Company any new rights

for constructing and maintaining a street railway system, but simply to fix the City's consent to the use of a new power upon a system already authorized to be constructed.

Counsel refer to some cases, which construe the effect of a grant confined to one particular power, where the Court held that such a grant did not preclude the City from granting to another company the right to construct an entirely different system of street railway to be operated by a *different* power, notably the case of

Omaha Horse Railway Co. v. Cable Tramway Co. of Omaha, 30 Fed. Rep. 322.

and commented on by the City in its brief, at page 127.

In that case the Omaha Horse Railway Company limited its business to a "horse railway" in its Articles of Incorporation; and it was granted the exclusive right to construct, maintain and operate a *horse street railway* in the City of Omaha; and to operate the same as a *horse* railway; the Court held that this did not preclude the City from granting to another company the right to construct and maintain a cable tramway line of street railway.

There was no question involved in that case, which is in any way applicable to this case, except the reference to the principle that public grants must be strictly construed.

The case of *North Chicago City Railway Co. v. Town of Lakeville*, 105 Ill. 227, quoted from by counsel for the City, page 141 of their brief, has been substantially modified by subsequent decisions of that Court, as pointed out by this Court in the case of *Blair v. Chicago*, 201 U. S. But before such modification that case had no application to the facts and conditions involved in this case. This is equally true of the other cases cited by the City on this subject.

Whether or not the City now has the right to grant to some other company the authority to construct and operate

street railways in the City of Minneapolis, is not involved in this case.

Counsel for the City at pages 150 and 166 of their brief state that the City had no power or authority to make a new grant to the company giving it the right to *construct* and operate a system of electric street railway lines for a fixed period at a fixed rate of fare, nor any power or authority to make a contract in relation thereto. On the other hand, counsel for the City admit at page 195 of their brief that the City had full power and authority to *consent to a change in motive power* under the 1875 ordinance. Unquestionably the City intended to accomplish something by the passage of the resolutions and ordinance relating to a change of motive power. As already shown, and as admitted by the City, it had power to consent to a change of motive power under the ordinance of July 9th, 1875. If the City had no authority as claimed by its counsel to make a new grant or contract relating to the construction and operation of a system of street railways by electricity, independent of the 1875 ordinance, then it must be conclusively presumed that the City in the passage of the resolutions and ordinance relating to the change of motive power, intended only to give its consent to the use of a new power on the lines which it, and the state, had already granted the right to construct and maintain under the ordinance of 1875.

The rule of construction is this: That where one of two constructions will give force and effect to the Legislative Act and intent, and the other makes it absurd or void, the Court will always adopt that construction which gives the act force and effect.

In *Joyce on Franchises,* Sec. 233, the Author says:

> "Of two constructions, one constitutional and the other unconstitutional, the former will prevail, and if both interpretations are equally reasonable, that in favor of the validity of the act should be adopted; or if one construction will lead to an absurdity the other should be favored." Citing a large number of cases.

In the case of *Oates v. National Bank,* U. S. 100, page 244 this Court said:

> "The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. *Wilkinson v. Leland,* 2. Pet. 627; Sedgwick, Const. and Stat. Constr. 196. And we should discard any construction that would lead to absurd consequences. *United States v. Kirby,* 7 Wall. 482. We ought, rather, adopting the language of Lord Hale, to be 'Curious and subtle to invent reasons and means' to carry out the clear intent of the law-making power when thus expressed."

And again in *Lau Ow Bew v. United States,* 144 U. S. 59, this Court says:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity v. United States,* 143 U. S. 457; *Henderson v. Mayor of New York,* 92 U. S. 259; *United States v. Kirby,* 7 Wall. 482; *Oates v. National Bank,* 100 U. S. 239."

Applying this principle of construction to the motive power ordinances in this case, and bearing in mind the claim now made by the City that it was powerless to make a new and independent contract in 1889 and 1890, does it not seem clear that the City intended to and did in fact only exercise the power it had under the ordinance of 1875

to consent to a change of motive power, and did not intend, or attempt, to do what it now claims it had no power or authority to do?

Counsel for the City in presenting their claims under the second subdivision of their brief state many times that the ordinance of September 19th, 1890, was not in fact or in any particular an amendment to the ordinance of 1875, and had no relation thereto.

When they come to consider the purpose and effect of Section 6 of the September 19th, 1890, ordinance they completely abandon this position and assert at page 200 that said Section 6 "is certainly, in effect a modification of Section 8 of the ordinance of July 9, 1875."

This last claim on the part of the City is unquestionably correct. Said Section 6 of the 1890 ordinance is an amendment of Section 8 of the ordinance of 1875. The words "modification" and "amendment" are synonymous. It is not necessary to state, in so many words, that a subsequent legislative act is an amendment, to an existing act; if it relates to the same general subject and identifies itself with the existing act in any way, by either reference to the act or reference to the subject matter of the act, and changes or modifies the existing act, then it is an amendment or modification of such existing act.

Taking the ordinance of September 19th, 1890, which refers specifically to the ordinance of July 9, 1875, both by title and subject, and by its very term shows that it was intended to be a modification of the 1875 ordinance, both as to motive power and as to the distance passengers should be carried under the transfer provisions on the payment of one full fare, the conclusion seems inevitable that it was intended as an amendment or modification only of the 1875 ordinance.

Counsel for the City at page 192 of their brief say:

> "The Company could not be said to be operating a street railway line unless it provided cars which reasonably met the requirements of the traveling public. It could not operate cars without some charge for such carriage. It could not operate a street railway system, without fixing upon some reasonable limit to the distance for which a passenger could be carried for one fare. It is impossible to conceive of the operation of a street car line without taking into consideration, not merely the cars provided and the rails upon which they may run, and the repairs which must necessarily be made upon them, but also the length of ride and the rate of fare."

Assuming this is correct, the resolutions and ordinance relating to the change of motive power, and which counsel for the City in another part of their brief assert are independent of the 1875 ordinance, make no reference to these subjects except by continuing the ordinance of 1875; and allowing it to remain and determine the rights of the parties on these subjects. It was unquestionably the intention of the City to allow the 1875 ordinance to continue, modified only as to the motive power to be used in the operation of such cars and the distance the passenger who had paid one full fare, as provided in that ordinance, should be carried.

Counsel for the City at pages 193 and 4 of their brief make reference to the ordinance of July 3rd, 1878, which contains no provisions relating to fare except by reference to the 1875 ordinance. It seems to us that the construction placed upon this 1878 ordinance by both the City and Company conclusively demonstrates just what the Company is contending for here, to-wit: That the ordinance of 1875 is the ordinance which fixes and determines the rate of fare the Company may charge. From the time of the passage

of the ordinance of 1878 down to the present time, the City has always considered that the ordinance of 1875 fixed the rate of fare the Company was entitled to charge in the operation of the lines provided for in the ordinance of 1878; just as we now claim that the ordinance of 1875 fixes the rate of fare which the Company may charge under the motive power ordinances of 1889 and 90, and which make reference to the 1875 ordinance on this subject and continues it in language much stronger than that contained in said ordinance of July 3rd, 1878.

The only question here is: Has the City given its consent to the use of electricity as a motive power upon the Company's lines of street railway, authorized to be constructed and maintained under the ordinance of July 9, 1875, and subject to the terms and conditions of that ordinance as to the rate of fare. And it seems to us this question is fully answered by a mere reference to the provisions contained in the resolutions and ordinance, under which the City gave its consent, and which we have already pointed out and discussed in this brief.

III.

Counsel for the City contend that if their first two propositions, which we have already discussed, are not correct, then the provisions contained in Section 8 of the ordinance of September 19, 1890, give the City full power and authority to reduce the Company's rate of fare to any point it sees fit, without the Company's consent; and in fact to pass any ordinance that the City may desire, relative to the Company's rights, and the Company cannot complain.

As we understand the claim now made by the City, it is this: That by accepting the ordinance of September 19, 1890, the Company *has agreed* that the City may enact such ordinances as it deems best, relative to any and all the rights of the Company under the ordinance of July 9, 1875; and the Company, by reason of such agreement, is precluded from questioning the power or right of the City to enact the same.

This is a startling proposition, and the City should certainly point to some very clear provision or agreement on the part of the Company, showing that it has surrendered such absolutely necessary and essential rights on its part, as the right to collect a five-cent fare, or the right to continue to operate its street railway system during the time mentioned in the ordinance of July 9, 1875.

If the City has the right to change the rate of fare, as it deems best, without the Company's consent; or has the right to reduce the period of the grant during which the Company may operate its system, then the Company's franchise is practically worthless.

While the question of whether the City can reduce the term or period of the Company's grant is not raised directly in this case, it follows as an irresistible conclusion, that if

the City has the power, as it now claims, to reduce the rate of fare without the Company's consent, it also has the power to reduce the term of the Company's grant without its consent.

This section of the ordinance of September 19, 1890, under which the City now claims such sweeping and destructive powers, reads as follows:

> "SEC. 8. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis, passed July 9th, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said City now in force or hereafter adopted, so far as applicable."

We wish to again ask the Court to bear in mind, what we have already stated in subdivision two of this brief relative to the two preceding resolutions relating to the change of motive power; and particularly to the provisions therein contained relative to the continuance of all of the terms and provisions of the 1875 ordinance, except as modified by the terms of the so-called motive power ordinances.

We have already discussed the claim of the City that this provision of the 1890 ordinance, now under consideration, makes applicable to the Company only such provisions of the 1875 ordinance as the City sees fit to impose, but does not make any of its provisions applicable to the City.

Let us analyze for a moment this section of the 1890 resolution, made remarkable by such an assertion. It says in plain language that the company, its successors and assigns, in the construction, maintenance and operation of its lines of street railway shall be subject

> "To all the conditions and limitations and other provisions of the ordinance of July 9, 1875, as the same has been amended and is now in force."

The amendments therein referred to must be those contained in the resolutions of July 19, 1889, and January 17, 1890, because these are the only *amendments* which had then been enacted by the City and accepted by the Company, and that is the only way the contract of 1875 could be amended.

It is thus self-evident that it was intended to continue, not only all the conditions and limitations contained in the 1875 ordinance, but also *all other provisions* contained in that ordinance, together with all amendments made thereto. This continues and makes a part of the September 19, 1890, ordinance, this declaration of the preceding ordinance of January 17, 1890, as follows:

> "The provisions of said resolution of July 19, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby, except in the particulars above indicated."

The fact that this last provision is continued over and made a part of the September, 1890, ordinance is made still more certain, by the fact that said Section 8, not only included the July 9, 1875, ordinance, as amended, but

> "All other ordinances of said City now in force."

What lines are referred to by the words, "Said lines of street railway" as used in said Section 8? No line of street railway are authorized to be constructed and maintained by the ordinance containing this provision, nor are any authorized to be constructed and maintained by either the January, 1890, or the July, 1889, resolutions. It necessarily follows that it has reference to lines of railway to be constructed, maintained, and operated under the July 9, 1875, ordinance, because there is no other ordinance or

resolution in existence, which authorizes the construction of street railway lines in the City of Minneapolis, excepting said supplemental ordinance of July 3, 1878.

It seems clear and self-evident that in the passage of the ordinance containing this clause, the City was simply fixing certain regulative duties in the use and application of the new motive power, and intended, and actually provided, that the ordinance of July 9, 1875, should continue and be determinative of all of the rights and powers of the Company, except as modified by the three motive power ordinances.

The City bases its authority to destroy the rights of the Company on the claim that the last seven words of said Section 8, namely, "Or hereafter adopted, so far as applicable," gives to it the power to enact any ordinance thereafter that it deems best.

To start with, the ordinances which the City may subsequently enact are restricted as to their scope by the words "So far as applicable."

It will be noticed that the words "Hereafter adopted, so far as applicable" are separated from the rest of the language of this section by the disjunctive "or," thus limiting subsequent ordinances which the City is authorized to enact, to such only as are applicable to the rights of the Company under the existing ordinances as modified. Such being the case, it seems to us that it was clearly intended to confine subsequent ordinances, to such regulations as might be necessary to meet the future development and use of this new power, and to safeguard the traveling public and secure to it convenient and adequate service; but it was never intended to give to the City the authority to take away from the Company its contract right to charge five cents for passengers carried on its lines to be operated by this new power.

The resolution of July 19, 1889, did not contain the words "Or hereafter adopted." The provision contained in that resolution continuing the ordinance of 1875, and other existing ordinances, reads as follows:

> *"Be it further Resolved,* That all the provisions conditions and limitations contained in an ordinance passed July 9, 1875, and approved July 17, 1875, entitled 'An Ordinance Authorizing and Regulating Street Railways in the City of Minneapolis,' and all other ordinances of said City, so far as applicable, shall apply to the construction and operation of said cable and electric street railway lines when not modified by the terms of this ordinance."

The resolution of January 17, 1890, authorizing the Company to use electricity on all existing lines has no such provision. On the contrary, that resolution specifically declares in the second section that:

> "The provisions of said resolution of July 19, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby, except in the particulars above indicated."

No mention of the rate of fare to be charged by the Company is made in any of these resolutions, and as already stated, the only reference to fare appears in the resolutions of July 19, 1889, and September 19, 1890, relating to the issuance of transfers, where it is provided that the Company shall issue a transfer check to any passenger who shall pay "one full fare." What is one full fare is not specified in either of these resolutions, and we have to turn to the ordinance of 1875 to ascertain the rate of fare. The City does not say in either case that a transfer shall be issued to a passenger who has paid one full fare, as hereafter fixed by the City; but does, in effect, say such transfer shall be issued to the person who has paid one full fare, as provided in the ordinance of 1875.

This ordinance of September 19, 1890, which the City now claims has abolished the Company's rights under the ordinance of 1875, in so many words continues the ordinance of 1875 "as the same is now in force." What portion of the ordinance is now in force? Certainly that portion as to the rate of fare as well as the period during which the Company may enjoy its franchise and use this substituted power. Fourteen years later the City refers to it as limiting the time during which some new lines shall be operated, and which the City then orders built. (See Folios 41 and 42 of the record.) The only changes made by this and the previous resolutions related to the motive power and the issuance of transfers. The words, "Now in force," mean that at the time of the adoption of the ordinance containing them all the provisions of the 1875 ordinance were in force, and they are still in force.

The City is thus placed in this anomalous position by its contention. It has specifically agreed in one portion of the contract, that it will not reduce the rate of fare below five cents, but claims, that in another portion of the contract, it has the right to reduce the rate of fare below five cents, and to any point it may see fit, notwithstanding this reservation, under which it claims such a right, limits all future resolutions or ordinances on the part of the City to such as *"are applicable."*

Under this provision of the 1890 ordinance the power to adopt such future ordinances as may be applicable, is no greater in its scope and extent than if Section 8 had been originally embodied in the ordinance of 1875; and is subject to the same limitations as though it were, in fact, embodied in that ordinance. Under such conditions what

authority does the City possess to pass this ordinance of February 22nd, 1907, which is in direct conflict with the provisions of the 1875 ordinance and in no way applicable thereto?

Counsel for the City throughout their entire discussion of this branch of the case, make no reference whatever to the words, "So far as applicable," and wholly ignore the limitation these words impose upon the power of the City to enact subsequent ordinances.

What is the meaning of the words, "So far as applicable?" It seems to us they can only mean not inconsistent with the terms of the contract as the same exists. Certainly an ordinance or resolution which sought to repeal or abolish this contract could not be applicable, because it would have nothing to apply to. It is equally clear that it could not mean an ordinance repealing or annulling so important an element of the contract as the rate of fare, because when it repeals that provision of the ordinance it has nothing to apply to.

The resolution passed in January preceding, authorizing the Company to use electricity on all *existing lines,* provides that the ordinance of 1875 shall not be modified or changed excepting as to the motive power and the issuance of transfers.

This resolution, including this declaration that the ordinance of 1875 should not be modified or changed is continued and made applicable to the ordinance of September, 1890, by the very terms of this provision, under which the City now claims the right to abolish it.

All these inconsistencies disappear when we adopt the natural and logical construction intended by the parties in the passage and acceptance of this provision of the September, 1890, ordinance, to-wit: That such subsequent ordi-

nances should be confined to such regulations as might be necessary to safeguard and protect the public, and had no reference to the rate of fare or to any other vital provision of the contract.

Could the City have intended anything more by the language used in the next ordinance, where it extended this motive power to *future lines,* than that in the use of this motive power, the Company should be subject to such necessary regulations as the City might thereafter adopt to meet any changed conditions in the application and use of such new power? Certainly the Company never understood that it was surrendering its rights under the ordinance of 1875, so far as the rate of fare is concerned, and if the City intended to secure such surrender, it should have done so in such clear and unambiguous terms as would have notified the Company of its intention.

As the Court forcefully said in *McNeil v. Chicago City Ry. Co.,* 61 Ill. 153:

> "If the company had intended to surrender its rights there would have been no necessity for the circumlocution used, but it would have said so in plain and unequivocal language. It should not be deprived of a valuable right by doubtful construction."

The Company was about to expend many millions of dollars in making changes in its system, and in order to do this was necessarily compelled to borrow millions of dollars for that purpose. It had at this time full authority to change the motive power on all existing lines, and to erect all necessary appliances for that purpose, under the resolution of January, 1890, which specifically continues the ordinance of 1875 as to rate of fare.

Can it be assumed for a moment that the Company intended to surrender that right in the acceptance of the ordinance of September following, when by doing so the Com-

pany would be surrendering its very power to borrow the money necessary for the enterprise?

The rate of fare is the most vital and important element in a public franchise, such as this company possesses under the ordinance of July 9, 1875.

In the case of *Detroit v. Detroit Citizens' Street R. R. Company*, 184 U. S. 372, this Court was called upon to construe, among other things, the effect of certain reservations in the so-called Tramway Act of the State of Michigan as follows:

> "All companies or corporations formed for such purposes shall have the exclusive right to use the same and operate street railways constructed, owned or held by them: Provided, however, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

The City of Detroit claimed that this reservation in the Tramway Act gave it the right to reduce the Company's rate of fare from time to time. In passing on this claim of the City of Detroit, this Court said, at page 384:

> "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such terms and conditions as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate of

> fare once deliberately and mutually agreed upon might thereafter and from time to time be altered at the pleasure of the city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to rate of fare amounted to a contract, and gave the company the right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe and efficient running of the cars, character of service, the speed and number of cars and their hours of operation and matters of like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language."

The language of the Tramway Act above quoted and passed upon by this Court is much stronger in support of the contention of the City of Detroit in that case, than the provision of the ordinance of September 19, 1890, under which the City in this case claims the right to reduce the rate of fare of this company. The language of the Tramway Act provided that the rights of the Company were subject "to such regulations and such *terms and conditions* as said authorities may from time to time prescribe." While the language in the ordinance of September 19, 1890, provides:

"That in the construction, maintenance and operation of its lines the Company is subject to the ordinance of July 9, 1875, and all other ordinances of said City now in force or hereafter adopted *so far as applicable.*"

It is only necessary to compare the reservation in the ordinance of September 19, 1890, with the language in the Tramway Act to see that the limitations on the power of the City in this case are much greater than were those upon the City of Detroit under the Tramway Act.

The subsequent ordinances of the City of Detroit, which this Court was called upon to construe in that case, also contain reservations in favor of the City, similar to that in the ordinance of September 19, 1890. There were reserved powers in those ordinances in favor of the City of Detroit as follows:

> "It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways.
>
> "Section 7 of the grant of November 14, 1879, re-enacting and extending the grant of November 24, 1862, is as follows:
>
> " 'The right to amend or repeal this ordinance in case of its violation by said company or companies is expressly reserved.'
>
> "Section 3 of the grant of January 5, 1885, authorizing the Brush street line, is as follows:
>
> " 'It is hereby reserved to the common council of the city of Detroit the right to make further rules, orders or regulations as may from time to time be deemed by the common council necessary to protect the interest, safety, welfare or accommodation of the city and public in relation to said railway.'
>
> "Section 3 of the Trumbull avenue line grant of July 31, 1865, is a literal copy of the one last quoted.

"Section 18 of the grant to the Grand River Street Railway of May 1, 1868, is as follows:

" 'It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, welfare or accommodation of the public in relation to said railways'

"The same reservation was contained in section 4 of the grant of June 27, 1885, of the Myrtle street route.

"And section 3 of the grant of August 3, 1888, relating to the Grand River line, is the same.

"Section 19, of the grant of January 31, 1865, to the Fort Wayne & Belle Isle Company is as follows:

" 'It is hereby reserved to the common council of the city of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways.' "

In construing this language the Court said, at pages 397 and 398:

"We are then brought to the question of the reservations in the ordinances themselves. An examination of them leads us to the conclusion that not one provided or was intended to provide for a power to alter an agreement in relation to the rates of fare entered into between the parties. The right from time to time to make such further rules, orders or regulations as to the common council may seem proper, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below, that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard 'to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turn tables, the repair of the pavement

between the tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent, for the protection of life, the accommodation of the public, and the avoidance of injury to private property such regulations are not invasions of the contract rights of the Company and are just and reasonable." *Lakeshore & Michigan Southern Railway Company v. Ohio*, 173 U. S. 285, 305.

"The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company. For the reasons already given, we think the language used does not, in fact, give any such power to the common council. The ordinances of 1899 are, so far as this record shows, the first wherein the common council has assumed to make any change in the rates of fare without the assent of the company, to be affected thereby. From 1862 until 1899 there seems to have been no attempt to exercise this alleged power of alteration by the common council without the consent of the railway company. While the rate of fare existed as agreed upon between the city and the railway company expenditures involving millions of dollars were entered upon, changing the mode of transportation from animal to electric power, and no claim seems ever to have been made on the part of the City of a right of alteration to be exercised in accordance only with its own views of reason and propriety. This is in itself a strong implication of the want of any such power under the various reservations set forth in the foregoing statement of facts, and con-

tain the ordinances specified. But aside from that and considering only the nature of the right itself growing out of the agreement as to fares we are of the opinion that not one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the City at its own pleasure to reduce the rates of fare agreed upon in those ordinances."

In the case of *New Orleans v. Telephone & Telegraph Co.*, 40 La. Ann. 725, the Court was called upon to construe language somewhat similar to that now in question. In that case the Court said:

"The main contention of the City, however, is that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows: 'That all the *acts and doings* of said company *under* this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same.'

"The City's construction of this section is strained and unreasonable and conforms neither to its spirit or letter.

"It is not conceivable that the grantee woud have invested its means in such an enterprise that it imagined that the terms and conditions of its enjoyment of the privilege lay at the entire mercy of the City. If such unreasonable contention lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously.

"But what is it that is subject to regulation and control by future ordinances?

"It is 'The acts and doings of said Company under this ordinance.' This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy or alter it in any of its essential features and considerations. It recognizes the right of the Company to act and to do under and

according to the ordinance, only subjecting such 'acts and doings' to municipal regulations not conflicting with the ordinance itself.

"We consider that the imposition of the additional burdensome consideration here involved is not within the scope of the rights reserved."

In construing a power reserved to the City of Baltimore quite similar to that contained in the September 19, 1890, ordinance, the Court held in the *Baltimore Trust Co. v. Mayor and City of Baltimore,* 64 Fed. 159, as follows:

"The only clause in Ordinance No. 23 providing for changes in or amendments to it is in the following words: 'And shall be subject to all general regulations now existing or hereafter to be made relating to city passenger railways not inconsistent with this ordinance.' I do not find the right to repeal in this reservation, but simply the right to regulate, provided that the regulations proposed are not inconsistent with the terms of the ordinance. The right to regulate will not be held to mean the right to repeal or materially modify, or, in effect, to prohibit, the exercise of privileges previously granted by the State or City, or to impair the obligation of a contract or destroy vested rights. I think that municipal corporations, invested with full power to control and regulate the use of their streets, do not exceed their powers in making irrevocable contracts, not exclusive in character, for the use of said streets, for purposes relating to the public comfort and convenience; and, also, that a legislative grant made either directly by the legislature, or indirectly through a municipal corporation duly authorized to act, constitutes a contract between the parties thereto, the terms of which cannot be altered without their mutual consent, except so far as the right to alter, amend or repeal is expressly reserved in the grant itself, or existed in constitutional or legislative provisions at the time of its passage. Were this not so, there would be but little security for investments made on the faith of such grants, and no inducement to those controlling capital to make improvements absolutely necessary for the health and

> happiness of the people, and for the progress and prosperity of the country. Justice required that such legislative enactments, when the grantees thereof have accepted the same, acted thereunder, should become absolute and irrepealable contracts, which neither party thereto will be permitted to revoke, nor allowed to disregard or add conditions thereunto more onerous than those first imposed."

In the case of *Chicago, R. I. & Pac. Ry. Co. v. City of Jolict,* 79 Ill. 44, the Court construes the effect of a broad reserve power to the City of Joliet as follows:

> "Some stress is laid upon a certain proviso in the ordinance of the common council of January 3, 1853, before referred to, which is as follows: 'Provided, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the City.' That only means, that the Company should be subject to all reasonable and legal ordinances for the regulations of the road. It had not such scope that the railroad should abandon and take up and remove its track at the bidding of the common council."

In the case of the *City of Pittsburg,* 115 Pa. St. 4, the Court was called upon to construe the power the city could assert under the act of the Legislature, which provided: "That city authorities might grant the use of streets to gas companies 'subject to such resolutions as the councils of any city may, by ordinance, adopt.' " The Court held that the City could not impose such conditions or regulations as were in conflict with the act itself. The Court said:

> "They have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agrees to accept the same, and be bound thereby; and even then the conditions or restrictions, so accepted by the company, must harmonize, and in no wise conflict with the provisions of the act. The assent of councils being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting, and repairing

the same, and the character thereof, with respect to safety and public convenience. These regulations must also be reasonable and not in conflict with any of the provisions of the act."

In the case of *Old Colony Trust Company v. City of Atlanta,* 83 Fed. 39, in construing the effect of reserved powers somewhat similar to those involved in this case, the Court said:

"The Atlanta Consolidated Street Railway Company obtained a charter from the secretary of state of Georgia, and afterwards, in connection with other street railroads of the state, obtained from the legislature a validating act, because of doubts entertained as to the power of the secretary of state to grant charters to street railway companies. This doubt afterwards proved to be well founded, when the supreme court of the state decided that the secretary of state had not such power. This validating act (Laws Ga. 1890-91, vol. 1, p. 169) provided that the street railroad companies whose charters were thus legalized should 'be subject to pave, and shall be liable for street paving and to other regulations of municipal corporations as are other railroads, and street railroad companies incorporated by separate act or acts by the law of this state.' It is claimed for the city by this provision the city obtained, and the Atlanta Consolidated Company became subject to, any and all provisions of any charters granted street railway companies by the legislature of Georgia; and as certain of these charters, one at least, contained a provision authorizing the city to fix rates of fare and freight, that this power was given to the city of Atlanta. There are two obvious difficulties about this contention: First, the power of 'regulation' does not necessarily embrace the power to fix rates of charge. There are many matters for it to cover without embracing this latter power. This city unquestionably has the right, within any reasonable limit, to regulate the speed of cars and other matters connected with their movement on the streets; where poles shall be placed in the case of overhead wires; how wires shall be located, and their

> location with reference to other wires and the safety of the same; and to do many other things which might be noted with reference to the occupancy of the streets, protection of life and limb thereon, and all such matters as involve the safe and orderly use of the streets over which it had, under the legislature, full power and control."

The Company was under no obligation to accept this ordinance of September 19, 1890. So far as the City was concerned it had given its full consent, and as far as it had the power to do so, authorized the Company to change the motive power on its entire system as it then existed without raising any question or doubt as to the Company's right to charge a five-cent fare. The only additional consent or authority the City gave to the Company, in the September ordinance, was as to future lines that the Company might build, or that the City might order the Company to build under the ordinance of 1875.

As stated in *Citizens' Railway case*, 166 U. S. 557, on page 570:

> "The ordinance had but a single object, which was to permit the substitution of electric for animal power, and it is scarcely possible that, if either party had understood that the franchise was to expire in January, 1894, four years from the time the electric ordinance was adopted the complainant company would have entered upon the work of changing its entire system of street railway into an electrical system and incurred the very large expense necessary for that purpose, knowing that before it could reap any substantial return from such an investment its rights in the streets of the city would expire by limitation. The improbability becomes the more apparent when it is considered that it was under no compulsion to make the change, and might, at its option, have continued the use of horse power until the original franchise had expired."

It is not conceivable that the Company would have accepted this ordinance of September 19, 1890, had it believed or known or suspected, or had any reason so to do, that under its terms the City had the right to abrogate its contract with the Company relative to such important matters as rate of fare and duration of its rights; for, as already stated, it necessarily follows that if the City can change the rate of fare under the reservation contained in the *ordinance of September 19, 1890, it can also reduce the period during which the Company has the right to use the streets of the City for street railway purposes under the ordinance of July, 1875.*

If the City's contention in the present case is sound and logical, the converse of the proposition must be true, to-wit: That the City would have the authority to contract with the Company as to rate of fare under legislative authority couched in the same language as that under which it now claims the right to change the rate of fare. That is, if the State had directly granted to the Company the right to construct and operate its street railway system and specified that the rate of fare should not exceed five cents, and also provided in the act that such grant should be subject to such ordinances as the City might thereafter adopt so far as applicable, the City could increase this rate of fare by subsequent ordinance. It hardly needs citation of authorities to show that such a claim would be unsound. It would be in direct conflict with the decision of this Court in

Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265.

On this question the Court, in *Old Colony Trust Co. v. City of Atlanta,* 83 Fed. 39, said:

> "A reservation in an ordinance granting the use of streets for a street railroad that such roads shall be

> 'subject to all the laws and ordinances now in force, and such as may be hereafter made,' does not authorize the city to pass an ordinance fixing rates of fare on such road, unless it is, either expressly or by necessary implication thereto authorized by some law of state."

On page 159 of their brief, counsel for the City assert it is inconceivable that the ordinance of September 19, 1890, could have passed the City Council, embodying in explicit language the *"present bald contention"* of the Company, that the ordinance of July 9, 1875, so far as the contract rights of the Company were concerned, were continued except as modified by the 1890 ordinances.

It may be unnecessary to comment upon a statement of this character, but we cannot refrain from calling the Court's attention to the fact that only nine months before the passage of this September 19th ordinance, the City did pass a resolution, conferring upon the Company the right to use electricity upon all of its *existing* lines, in which the City specifically provided for just what counsel seem to think it necessary to characterize as a *"bald contention."*

We refer to the following provision of the resolution of January 19, 1890:

> "D. *The provisions of said resolution of July 19, 1889, and all other ordinances and resolutions of the Council shall not be modified or affected hereby, except in the particulars above indicated."*

Counsel for the City assert, and many times reiterate, in their brief, that the Company claims that the so-called motive power ordinances continue the provisions of Section 8 of the 1875 ordinance unmodified; thus giving the Company the right to charge five cents for one "continuous ride of not more than three miles in length."

This assertion on the part of the City is absolutely foundationless, unjustifiable and unfair in every sense.

Counsel can have but one purpose in view in making it, and that is to create in the minds of the Court an incorrect and prejudicial impression; forgetting in their zeal the character of the Court before whom it is made.

Section 8 of the ordinance of July 9, 1875, *is modified* by the provisions relating to the issuance of transfers, contained in all of the ordinances and resolutions relating to a change of motive power. This modification or amendment to Section 8 is perhaps best disclosed by again quoting this transfer provision:

> "SEC. 6. Passenger cars on all said lines shall run between extreme limits on all extensions to or near the intersection of Washington avenue with Hennepin avenue, without change of passengers, traveling thereon, and after November 1st, 1890, said Street Railway Company shall issue transfer checks at the junction of said lines at Washington and Hennepin avenues to any passenger on any of said lines, who shall pay one full fare, which transfer check shall entitle the passenger so receiving the same to a continuous passage on either of said connecting lines, provided that no passenger shall be entitled to more than one transfer check for one fare, and provided further, that such transfer check shall be used upon the next car departing on the connecting line upon which it is to be used. And, if any of the lines of said railway do not connect at said Washington and Hennepin avenues, transfer checks shall be given at the point nearest the crossing of Washington and Hennepin avenues, where such lines do connect with a line reaching said junction point at Washington and Hennepin avenues."

This provision unquestionably requires the Company to so operate its system, that a passenger can board a car at any point along any line, and for one fare be carried to a connecting line, and by the use of the transfer, on the connecting line to the City limits or such intermediate point as the passenger may desire to reach. That is, on the pay-

ment of one fare, a passenger, by reason of this transfer provision, can ride from the city limits on one side, to the city limits on the other, a distance of more than eleven miles, and there can be no possible doubt about this.

That has always been the construction of this provision by the City and the Company, and for seventeen years last past the Company has been carrying passengers from the extreme city limits on one side, to the city limits on the other side, by issuing a transfer to any passenger who has paid one fare; and on some lines under this provision passengers can and do ride about fourteen miles on one fare of five cents.

We leave counsel on this subject to enjoy such hope or expectation as they may entertain that any one is going to be deceived by such an assertion.

If the September 19, 1890, ordinance completely superseded and in effect repealed the ordinance of July 9, 1875, under what authority has the Company been charging a five-cent fare during the past seventeen years?

There must be some action on the part of the City which authorizes the Company to collect such a fare. Counsel, at page 208 of their brief, state: "It would, of course, be perfectly idle for the City to contend that because fare was nowhere mentioned in the granting parts of this ordinance, consequently the Minneapolis Street Railway Company was to construct, maintain and operate its lines without any charge for carriage." It is equally idle to contend that if the ordinance of July 9, 1875, is superseded and abandoned by the September, 1890, ordinance, as now claimed by the City, that the Company has had any right or authority to charge and collect five cents for each passenger riding upon its lines during the past seventeen years, and to which the

City during that entire period has raised no objection or in any way questioned the right and authority of the Company to charge and collect the same.

Reference is made by counsel for the City to the so-called "Harvey transfer ordinance," which was passed July 14, 1893, as being an assertion on the part of the City that it was not bound by the ordinance of 1875. We wish briefly to refer to the facts relating to that ordinance as disclosed by the records in that case.

The City, in its answer, sets forth the pleadings and decision in relation to the passage of that ordinance and its final acceptance by the Company.

As already pointed out in this brief, the resolution of July 19, 1889, contained a provision relating to the issue of transfers in case the Company accepted that resolution, and changed its motive power as therein authorized. The ordinance of September 19, 1890, contained a similar provision extended only so as to meet the conditions of that ordinance.

Later on it was found that these provisions for issuing transfers did not meet all conditions satisfactorily, and the City passed the resolution set forth at Folio 169 of the record, which changed the system of issuing transfers. This resolution the Company accepted, as shown at Folio 171. This change again prove unsatisfactory, and the City passed the ordinance set forth at Folio 172 of the record, again changing the system of issuing transfers. This ordinance the Company also accepted, as set forth in Folio 175 of the record. The City subsequently claimed that this last ordinance, relating to the manner of issuing transfers, was unsatisfactory, in that it caused congestion in the streets of the City, interfered with travel and endangered the lives of people using the streets. In order to obviate this the

City passed said ordinance of July 14, 1893, found at Folio 100 of the record. This ordinance the Company did not accept; and the City brought an action in the District Court of Hennepin County, Minnesota, to compel the Company to observe the provisions of that ordinance relative to the manner of issuing its transfers. The City claimed the right to enforce this ordinance on the ground that it was a proper police regulation, and related to the manner of *"operating"* the cars of the Company, as provided in Section 8 of the ordinance of September 19, 1890.

The preamble of this ordinance of July 14, 1893, shows clearly the reasons why the City deemed it necessary to pass it, and that the City's action in passing it was an exercise of its police powers. The ordinance states as follows:

> "WHEREAS, the provisions regulating the transfer of passengers on the lines of the Minneapolis Street Railway Company, as contained in an ordinance entitled * * * are in their practical operation, oppressive, unreasonable and a burden and hardship on the public, NOW THEREFORE, etc."

As shown at Folio 132 of the record, the Court held that the issuance of transfers under the system then established resulted in much confusion, disturbance and obstruction on the streets, and occasioned much inconvenience and danger to the Company's passengers and others on the street; all of which would not occur if the Company adopted the ordinance the City was then attempting to enforce. (See Folios 198 and 217 of the record.)

The Court further held that the passage of the ordinance in question was a proper exercise of the police power of the City relating to the *operation* of street railway lines, and that the City had the power to enact such an ordinance under Section 8 of said ordinance of September 19, 1890.

The Court, in its conclusions of law, stated it was of the opinion—

> "That the ordinance in question may be enforced as a police regulation if the obligations imposed on the respondent are not unreasonable and do not substantially impair the property rights of the respondent."

The Court further stated, at Folio 218 of the record, that the questions involved in that case ought to be settled between the parties, out of court, so that the rights of all should be preserved. After the decision was rendered in that case, the Company accepted this suggestion made by the Court, and put the ordinance in effect; and thereupon a stipulation was entered into between the City and the Company, under which that suit was *dismissed and no judgment was entered therein or other proceedings had.* (See Folio 219 of the record.)

A comparison of the provisions of this ordinance of July 14, 1893, with the provisions of Section 6 of the September 19, 1890, ordinance, relating to the same subject, shows that the only material difference relates to the place at which the transfer shall be issued.

There is nothing in this last ordinance which extends the ride a person is entitled to receive under the ordinance of 1875 as modified by the transfer provision in the resolution and ordinance of July, 1889, and September, 1890; in fact, the only thing sought to be accomplished by the passage of the 1893 ordinance related to the convenience of passengers receiving the transfer, and the avoidance of congestion and danger on the streets, caused by the issue of transfers at a single point as provided in the preceding ordinances.

By what process of reasoning the City now reaches the conclusion that the passage of the July, 1893, ordinance

and its acceptance by the Company amounts to a change or modification of the rate of fare the Company is entitled to charge, under the ordinance of 1875, we do not understand.

In conclusion, we wish again to call the Court's attention to the salient facts in this case and the ultimate effect of the City's contention, in relation thereto.

In 1875 the Company was granted the right, for a period of fifty years, of constructing and operating a street railway system in the City of Minneapolis; and to charge a five-cent fare for the carriage of passengers on its lines.

This grant was ratified by the State.

The City limited the power to animal or pneumatic, reserving the right to *consent to the use of other power.*

The Company built more than forty miles of street railway lines under this grant prior to 1889, at which time animal power had become wholly inadequate to meet the requirements of the City, and the needs of the traveling public; and the City being desirous of having the Company change its motive power and extend its lines of railway to meet this growth and development of the City, gave its consent to a change of motive power. The only conditions the City imposed, in giving such consent, were that this change in motive power should be made within a specified time; and when such new power was installed and the lines extended the Company should issue a transfer to any passenger who had paid one full fare of five cents, which would enable the passenger so receiving the same to travel from one side of the city to the other for that one fare.

The City of Minneapolis in 1889, and now, covers a territory of approximately forty-four square miles. A large portion of this area is necessarily sparsely settled. This Company, relying upon its contract of July 9, 1875, with

the City and its right to charge a five-cent fare, as therein provided, has expended many millions of dollars in making the changes required by the development and progress of the City, and at the request of the City has changed and developed its entire system from that of a comparatively small one, operated by an inferior power, to what is universally recognized as one of the most complete and up-to-date systems of street railways in the world, with more than one hundred and fifty miles of track. In doing this it has held out to the investing public this franchise of 1875, and its right to receive the compensation therein named, for the transaction of its business. On this representation it has induced investors to advance millions of dollars, which this Company has expended in that enterprise.

From 1890 down to 1907, a period of seventeen years, the City never intimated that it claimed the power it now seeks to exercise under this clause of the ordinance of September 19, 1890. Nor did the City during that time ever questioned the existence of this contract and ordinance of July 9, 1875, in all its terms and provisions excepting as to motive power, and the issuance of a transfer. On the contrary, the City has repeatedly recognized its existence; has ordered this Company to build miles upon miles of new lines and to equip and operate them, as it claims the power to do, under this ordinance of 1875.

The Company has never questioned this authority on the part of the City; and without the existence of this ordinance of 1875, the City had no power or authority to require this Company to build these new lines, and extensions of existing lines, and expend vast sums of money in so doing.

As late as April, 1907, the City recognized the existence of this ordinance of July 9, 1875, in so far as it gives the City the right to compel this Company to build such lines

as the City may decide, public convenience or necessity require. If the present contention of the City is correct, it has done all of this, while it retained the undisclosed belief that it could abrogate the most vital and essential parts of this contract, at its own will, and yet hold the Company to the most burdensome part of it. It is in this position, burdened with these inequities, that the City now stands before this Court asking it to place this unnatural and, as seems to us, impossible construction upon this ordinance of September 19, 1890.

We respectfully submit that the judgment and decree appealed from should be affirmed.

M. B. Koon
Of Counsel for Appellee.

M. D. Munn
Solicitor for Appellee.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 46.

Office Supreme Court, U. S.
FILED.
NOV 9 1909
JAMES H. McKENNEY,

THE CITY OF MINNEAPOLIS,
Appellant.

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,
Appellee.

Appellee's Brief.

N. M. THYGESON,
Solicitor for Appellee.

M. B. KOON,
Of counsel for Appellee.

Review Publishing Company, Minneapolis, Minnesota

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Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 46.

THE CITY OF MINNEAPOLIS,

Appellant.

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,

Appellee.

Brief on Behalf of Appellee.

STATEMENT OF FACTS AND MAIN ISSUES.

In 1873, when appellee was incorporated, the enabling acts under which corporations could be organized in the State of Minnesota, so far as here material, read as follows:

TITLE I.

OF CORPORATIONS EMPOWERED TO TAKE PRIVATE PROPERTY FOR PUBLIC USES.

Sec. 1. Any number of persons, **not less than five**, may associate themselves and become incorporated for the purpose of building, im-

TITLE II.

OF CORPORATIONS FOR PECUNIARY PROFIT OTHER THAN THOSE NAMED IN TITLE I.

Sec. 45. Any number of persons **not less than THREE**, who have or shall, by articles of agreement in writing, associate according to the provis-

proving, and operating railways, telegraphs, canals, or slackwater navigation, upon any river or lake, and all works of internal improvement which require the taking of private property or any easement therein.

* * * * * *

Sec. 3. * * *

Said articles shall contain:

First. The name of the corporation, the general nature of its business, and the principal place, if any, of transacting the same.

Second. The time of commencement and the period of continuance of said corporation.

Third. The amount of capital stock of said corporation, and how to be paid in.

Fourth. The highest amount of indebtedness or liability to which said corporation shall at any time be subject.

Fifth. The names and places of residence of the persons forming such association for incorporation.

Sixth. The names of the first board of directors, and in what officers or persons the government of the corporation and the management of its affairs shall be vested, and when the same are elected.

Seventh. The number and amount of the shares in the capital stock of said corporation.

* * * * * *

Sec. 5. No such corporation shall be formed to continue more than FIFTY YEARS, in the first instance, but it may be renewed from time to time for periods not longer than fifty years: **Provided**, that three-fourths of the votes cast at any regular election for the purpose are in favor of such renewal, and those desiring a renewal purchase the stock of those opposed thereto at its current value.

ions of this title under any name assumed by them for the purpose of engaging in and carrying on the business of mining, smelting or manufacturing iron, copper, or other minerals, or for producing the precious metals, or for quarrying and marketing any kind of ore, stone, slate or other mineral substance, or for constructing, leasing or operating docks, warehouses, elevators or hotels or as a mutual savings fund, loan or building association, manufacturing gas, or for any kind of manufacturing, lumbering, agricultural, mechanical, mercantile, chemical, TRANSPORTATION OR OTHER LAWFUL BUSINESS, and who have or shall comply with the provisions of this title, shall, with their associates, successors and assigns, constitute a body corporate and politic under the name assumed by them in their articles of agreement: **Provided**, no company shall take a name previously assumed by any other company. Any mutual saving fund, loan or building association, as authorized to loan funds and to secure such loans by mortgage or other security, and any premiums taken by any such association for the preference or priority of such loans, shall not be deemed interest within the meaning of section one of chapter twenty-three of the general statutes. Any such association is authorized and empowered to purchase at any sheriff's or other judicial sale, or at any other sale, public or private, any real estate, upon which such association may have or hold any mortgage, judgment, or lien, or other incumbrance, or in which such association may have an interest, and the real estate so purchased, to sell,

(Bissell's Statutes, 1873, page 419. See also Supplemental Brief, page 82).

* * * * * *

Sec. 13. Any corporation organized or reorganized under the provisions of this title, may obtain the right of way over and across any lands needed for the construction of any railroad or telegraph, and all necessary sites for grounds and depots, shops and other buildings requisite for the proper carrying on of the business to be transacted, or may obtain the right to overflow by reason of any dam, lock, sluices, or other erection necessary for the convenient protection of their enterprise, all and any lands damaged thereby, and may obtain the right to the use of any land for a tow path, the erection of necessary buildings for the purpose of said business, and the right of way in and over the bed of any river, lake, or water course, and the banks thereof, together with the right to overflow, injure or destroy any existing dams, mills, or other property, and to canal in and along the valley of any such river, stream, lake, or water course, and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business upon the water power incidentally created by such improvement, by proceeding as in this title provided."

convey, lease, or mortgage at pleasure, to any person or persons whatsoever.

* * * * * *

Sec. 47. The amount of capital stock in any such corporation shall in no case be less than TEN THOUSAND DOLLARS nor more than FIVE HUNDRED THOUSAND DOLLARS, and shall be divided into shares of not less than TEN DOLLARS nor more than FIFTY DOLLARS each, except that the capital stock of mutual building and loan associations may be divided into shares of two hundred dollars each, but the capital stock and number of shares may be increased at any regular meeting of the stockholders; **Provided,** the capital stock when so increased shall not exceed FIVE HUNDRED THOUSAND DOLLARS.

Sec. 52. No corporation shall be formed under this title to continue more than THIRTY years.

(Bissell's Statutes, 1873, page 443. See also Supplemental Brief, page 84).

*

The appellee railway company charged in its amended bill of complaint that it was organized on the first day of July, 1873, as a corporation for the period of FIFTY YEARS (Fol. 3, rcd.). A true copy of the original certificate of incorporation may be found at folios 59 and 60 of the printed record. The first paragraph thereof (folio 59 of the record), after stating the name of the corporation, proceeds:

> "The general nature of its business is to CONSTRUCT AND OPERATE RAILWAYS in the streets and highways of the city of Minneapolis and its suburbs, in the county of Hennepin, State of Minnesota."

The second paragraph of the original articles of incorporation, as to the duration or period of existence of appellee corporation, provides:

> "The time of commencement of said corporation is the first day of July, A. D., 1873, and the period of continuance of the said corporation is FIFTY (50) YEARS thereafter." (Fol. 59, rcd.)

In 1873, when the above articles were filed, there was no separate statute or enabling act providing for INCORPORATION OF STREET RAILWAY COMPANIES. If such corporations were organized in the state under a general law it was either under Title I or Title II from which quotations are given above. Title I and Title II as they stood in 1873 may be found in 1 *Bissell's Statutes at Large*,—Title I at page 419 and Title II at page 443 of said Bissell's Statutes. These Statutes only brought down to date the Revised Statutes of Min-

nesota, 1866, which were an enactment of the state legislature. Title I and Title II form a part of Chapter 34 of the Revised Statutes of 1866 and may be found at pages 263 and 272 respectively of said Revised Statutes (see also Supplemental Brief, pages 55 to 78.

It is under Section 1 of Title I that appellee claims to be incorporated. Under this Title corporations could be created to endure for FIFTY years,—the period named in the articles of incorporation of the defendant in error as its period of duration. Section 5 of said Title I as to duration of corporations provided:

> "Sec. 5. No such corporation shall be formed to continue more than FIFTY (50) YEARS in the first instance," etc.

On the other hand appellant claims that appellee company could not incorporate under Title I and and thereby become a corporation for FIFTY years, or until 1923, but it must and was in fact incorporated under Title II, which permitted corporations to be organized for a period of not to exceed THIRTY (30) YEARS, because Section 52 of said Title II provided:

> "No corporation shall be formed under this Title to continue more than THIRTY (30) YEARS."
>
> See Vol. 1, *Bissell's Statutes at Large*, Sec. 52, p. 444.

The city strenuously contends that this appellee railway company was organized as a transportation company under the above Section 45 of Title

II, and that it was not organized as a *railway company,* or a *work* of *internal improvement* under Section 1 of Title I of Chapter 34 of the General Statutes of Minnesota 1866, and its amendments.

The seventh paragraph of the original articles of incorporation of appellee railway company (Fol. 60, rcd.) reads as follows:

> "The number and amount of shares of the capital stock of said corporation is twenty-five hundred shares of ONE HUNDRED DOLLARS EACH."

In the important particular of the character of stock, the amount of its face value authorized to be issued, the seventh paragraph of the articles of incorporation of the company complies with Title I and violates Section 47 of Title II, which read thus:

> "The amount of capital stock in any such corporation shall in no case be less than ten thousand dollars, nor more than five hundred thousand dollars, and shall be divided into shares of NOT LESS THAN TEN DOLLARS, NOR MORE THAN FIFTY DOLLARS EACH, except that the capital stock of mutual building and loan associations may be divided into shares of two hundred dollars each."

These conflicting claims of the respective parties to this action as to what enabling act applied we may for convenience call THE FIRST ISSUE. If the court holds that appellee was not organized under Title I, then will arise another question, viz: whether the legislature by Chapter 299 of the Special Laws of Minnesota, 1879 (fols. 17 and 168, rcd.), has not determined and fixed the period of

duration of appellee as a corporation by ratifying and confirming the ordinance passed by the common council of the city of Minneapolis on the 9th day of July, 1875 (Fols. 6-14, rcd.), which purported to grant to appellee a franchise to operate a passenger railway line in the streets of the city of Minneapolis DURING THE TERM OF THE CHARTER OF THE APPELLEE.

Section 1 of the ordinance of 1875 referred to provides as follows:

> "Sec. 1. That the MINNEAPOLIS STREET RAILWAY COMPANY BE AND IS HEREBY GRANTED, DURING THE TERM OF ITS CHARTER, the exclusive right and privilege of CONSTRUCTING AND OPERATING a single or double track for a passenger railway line with all necessary tracks for turnouts, side-tracks and switches, in such streets of said city as the city council may deem suited to street railways, subject to the terms, conditions and forfeitures hereinafter contained, *provided*, that the city council reserves the right to limit the said company to the construction of a single track upon such street or streets as it may deem proper" (Fol. 6, rcd.)

The Special Law of 1879 (Chap. 299) is as follows:

> "An act to confirm the grant of the city of Minneapolis to the Minneapolis Street Railway Company.
>
> "That whereas the city of Minneapolis did by ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis passed by the city council of said city on the 9th day of July, 1875, and approved by the mayor of said city on the 17th day of July, 1875, etc., * * * grant to the Minneapolis Street Railway Company the right

> to construct and maintain a street railway through the streets of said city, with certain rights and privileges in said ordinance particularly set forth; NOW the said right to construct and maintain said street railway through the streets of said city, with the RIGHTS AND PRIVILEGES AS SET FORTH AND QUALIFIED IN SAID ORDINANCE, IS HEREBY LEGALIZED AND GRANTED TO SAID COMPANY." (Fols. 17 and 168, rcd.)

Appellee claims, whatever may have been the facts as to the period of its existence as a corporation before 1879, after the passage of the above special law it became a corporation for at least FIFTY (50) years, or during the time specified in its articles of incorporation or charter (Fol. 59, rcd., par. 2). This may for convenience be called THE SECOND ISSUE, though really a part of the first issue.

THE THIRD ISSUE has reference to the making and to the present existence of a contract between the parties on the subject of the rate of fares which the appellee is entitled to charge and collect from passengers who patronize its railways. Section 8 of the ordinance of July 9, 1875, provides as follows:

> "Sec. VIII. The said company may regulate and establish from time to time such rates of fare for the transportation of passengers and freight over its lines of railway as it may deem proper; provided, that the charge for carrying a person, including hand-baggage, from one point to another within the city limits, whether by one or more lines operated by the same company shall not exceed five cents

on any one line; provided, further that the city of Minneapolis hereby reserves the right to alter and regulate the rate to be charged by the said companies, their successors and assigns, for the transportation of passengers and freight at the expiration of five years from the approval of this ordinance, and every five years thereafter, fixing the same at such rates as the city council of said city may deem just and reasonable; PROVIDED THAT THE CITY SHALL NOT REDUCE THE PASSENGER'S FARE BELOW FIVE CENTS OVER ANY ONE CONTINUOUS LINE; and what shall be considered a continuous line may be designated by the city council of the said city, but that said council shall not designate any such continuous line to be more than three miles in length." (Fol. 10-11, rcd.)

Section 17 of the ordinance of July 9, 1875, provides as follows:

"Sec. XVII. Within thirty days from the publication of this ordinance said company shall file with the city clerk a written acceptance of the grants hereinabove made, with the conditions, regulations, and limitations above expressed, signed by the president and secretary of said company, AND WHEN SO ACCEPTED THIS ORDINANCE SHALL OPERATE AS A CONTRACT BETWEEN THE CITY AND SAID COMPANY, and upon failure to file such acceptance, as aforesaid, then the above grant shall not become operative to vest any rights, privileges, or franchises whatsoever." (Fol. 14, rcd.)

The appellee claims that the special law of 1879 (Chap. 299) referred to, and the above ordinance of July 9, 1875, when accepted in the manner provided therein and when it built street railways

thereunder, (said ordinance and law) made a binding contract between the parties to this action and the state of Minnesota prohibiting appellant from reducing the passenger fare which the appellee company was entitled to collect upon its street railway lines below five (5) cents. This ratifying act created competent parties to the contract if they or either of them were not competent parties before this ratifying act. It made the appellant city on the one hand competent and capable of carrying out its part of the contract, and it made the appellee a corporation capable of carrying out its part of that contract and for the term and period specified in the charter, to-wit: for the period of at least FIFTY years or until 1923. By virtue of said contract the parties to this action were authorized to contract (if not before so authorized), as to change of motive power and the city was authorized to empower the cars to be operated by electricity as was done under the ordinance of September 19, 1890 (Fols. 35-39, rcd.) as well as by resolutions prior to that ordinance. This is the claim of the appellee, which is denied by the appellant. This as already stated, is to be considered the *third issue.*

THE FOURTH ISSUE to be considered will be: Is the contract under the ordinance of 1875, as to rate of fare, still in existence, or has it been repealed or abandoned by the acceptance of the electric ordinance of September 19, 1890, (found at Fols. 35-38, rcd.)? The appellee claims that the original ordinance AS TO FARE is still the existing contract, and that no modification thereof has been

made except as to the giving of transfers; that the electric ordinance is not a new contract on the subject of fares but as to motive power principally, that it is a mere regulation or new agreement under the authority of the original contract or ununder police power or was ratified by Chapter 74, Gen. L. 1893, as to motive power, and, further, if said electric ordinance is without authority, then the city cannot complain, but only the state of Minnesota can do so. The appellee, on the other hand, claims that the electric ordinance wiped out all prior ordinances, and substituted in place thereof a permit or license that may be revoked at pleasure. It also further claims that under the city charter (Fol. 81, rcd.) and under certain reservations in the electric ordinance of September 19, 1890, it was given the authority to regulate the fare to be charged by the company. The provision of the ordinance of September, 1890, relied on to authorize the change of fare, is as follows:

> "Sec. 8. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, AND ALL OTHER ORDINANCES of said city now in force or hereafter adopted, SO FAR AS APPLICABLE." (Fol. 38, rcd.)

ADMISSIONS IN THE ANSWER OF APPELLANT.

1.

The appellant admits that Exhibit A (Fols. 59, 60, rcd.) is a true copy of the articles of incorporation of the appellee (Fol. 72, rcd.).

2.

Appellant further admits that it is a municipal corporation, and that its present charter is found in Chapter 76 of the Special Laws of the State of Minnesota, 1881 (Fols. 221, 222, and Fol. 74, rcd.).

3.

It admits that this action is one in equity and of a civil nature (Fol. 75, rcd.).

4.

It admits the passage, publication and acceptance of the ordinance of July 9, 1875 (Fols. 75, 76, rcd.)

5.

It admits that the city council of the city of Minneapolis duly passed the ordinance of July 3, 1878, as amended by the ordinance of July 10, 1878, providing for the operation of certain lines of street railway in the city of Minneapolis with animal,

steam or other power (See Fol. 15 for the ordinance of 1878, and Fol. 76 for admission of its due passage).

6.

It admits the passage of the legislative act Chapter 299 of the Special Laws of 1879 (Fol. 76, rcd.), and that a true copy thereof is set out in plaintiff's bill at Fols. 16 and 17, rcd.

7.

Appellant further admits all allegations contained in paragraph 7 of the amended bill, which alleges that between 1878 and 1890 the common council of the appellant, pursuant to the provisions of the ordinance of July 9, 1875, designated additional streets and avenues within its corporate limits suitable for street railway purposes and that public necessity required street railways thereon, and that more than twenty-five additional miles of railway was built, and in so doing appellee spent many millions of dollars (For paragraph 7 of the amended bill see Fols. 17, 18; for the admission see Fol. 76, rcd.).

8.

Appellant further admits paragraph 8 of the bill, which alleges the passage and acceptance of resolutions and ordinance requiring the construction of cable lines and of electric lines (Fols. 77-79, rcd.).

9.

It further admits, at Fol. 80 of the record, that it claims the right to regulate fare under its charter, to-wit, the hack provision above referred to. (Fol. 81, rcd.) For charter provisions of the city see Supplemental Brief, pp. 99, 100.

10.

It further admits that it passed the assailed ordinance of 1907 (Fol. 81, rcd.).

11.

It also admits the passage of two resolutions of April 5, 1907 (For resolutions see Fols. 42 and 43, rcd; for admissions see Fols. 85 and 86, rcd.). Said ordinances require the construction of additional railway lines under and in pursuance of the ordinance of 1875.

The opinion of the Circuit Court (Fol. 231, rcd.) was rendered on the hearing of an order to show cause why a temporary injunction should not issue as prayed in the bill of complaint (Fol. 225, rcd.). The decree was entered by consent of counsel for appellant. This was done before time for filing replication had expired. It is to reverse this decree that this appeal is taken.

Only three points are made on behalf of the City of Minneapolis on this appeal, viz:

First: That the appellee was incorporated under Title II, and not under Title I;

Second: That the ordinance of September 19, 1890, wiped out all prior ordinances;

Third: That under the reservation in the ordinance of September 19, 1890, the appellant city claims the right to regulate the fare of the appellee (See pp. 11 to 13, Appellant's brief).

We shall, therefore, in this brief confine ourselves to a discussion of those three questions, as we understand the rule to be that failure to present and insist upon errors assigned in the court below constitutes an abandonment or waiver of all errors so assigned and not discussed.

ARGUMENT.

Before entering upon the discussion of the first contention made in the city's brief an apology is due this court for taking up so much time and space in considering a question which seems to be without merit. Counsel for the city have presented it with so much earnestness and evident belief therein, and having due respect for their ability and earnestness we feel compelled to follow them and make answer to the various propositions embodied in their first contention. We cannot escape the conviction that the court will treat the ordinance of July 9, 1875, AS THE PARTIES AGREED THAT IT SHOULD BE TREATED and construe it AS A CONTRACT. In section 17 of the ordinance (fol. 14, rcd.) the parties agree that the ordinance, when so accepted, shall OPERATE AS A CONTRACT between the city and said company. The legislature, by the ratifying act (chapter 299, special laws 1879) ratified that provision as well as the rest of the ordinance. That means that this ordinance should be construed as contracts are construed. At page 100 below we have given the authorities as to the effect of a stipulation of this character. This court, in the *Detroit* case, 184 U. S. 387-389, distinguished between the interpretation to be given to legislation and that to be given to contracts. The charter of the Georgia R. R. Co. provided:

"That the charge of transportation and con-

> veyance SHOULD NOT EXCEED FIFTY CENTS PER HUNDRED POUNDS FOR HEAVY ARTICLES, AND TEN CENTS PER CUBIC FOOT ON ARTICLES OF MEASUREMENT FOR EVERY ONE HUNDRED MILES, AND FIVE CENTS PER MILE FOR EVERY PASSENGER."

This court held that this language did not constitute a contract prohibiting the State from regulating rates. In the *Detroit* case the language of the ordinance on the subject of rates read as follows:

> "The rate of fare for any distance shall NOT EXCEED FIVE CENTS IN ANY ONE CAR, OR ON ANY ONE ROUTE NAMED IN THIS ORDINANCE, EXCEPT WHERE CARS OR CARRIAGES SHALL BE CHARTERED FOR SPECIFIC PURPOSES. Provided, cars so chartered shall not be considered regular cars, within the meaning of the preceding section."

In the *Georgia* case the language is "SHOULD NOT EXCEED FIFTY CENTS PER HUNDRED POUNDS"; in the *Detroit* case "THE RATES OF FARE SHALL NOT EXCEED FIVE CENTS." The *Georgia* case was pressed upon the court as an authority to be adopted in the construction of the Detroit ordinance. In answer to that contention this court, at page 388 of the *Detroit* case, says:

> "It may very well be that the language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them, would be regarded as forming a contract because the stat-

ute provided specially for that mode of determining them. Under such direction we are of opinion the language used in the ordinance amounts to an agreement, for that is the way in which the rates are to be arrived at, and the reaffirmation of the previous language, by reaffirming and adopting the ordinance of 1862, by the ordinance of 1879, and its acceptance, constitute an agreement as of that time. The same as to the ordinances relative to the other roads. The rate of fare having been fixed by positive agreement under the expressed legislalative authority the subject is not open to alteration thereafter by the common council alone under the right to prescribe from time to time the rules and regulations for the running and operation of the road."

Applying to section 1, of the ordinance of 1875, THE CONSTRUCTION APPLICABLE TO CONTRACTS, there seems to be no necessity of going into the refinement and technicality of determining the legal status of the corporation which was applying for the ordinance of July 9, 1875. The council of the city was made up of hard-headed business men of affairs, in all probability. The law required the articles of incorporation to be filed with the Secretary of State; to be recorded in the office of of the Register of Deeds of the county where the principal place of business of a corporation is located, and to be published in the papers. When this corporation came before the common council of the city of Minneapolis applying for a franchise to operate railways in the streets of the city, the council was dealing with presumed knowledge of the facts and of the character of the corpo-

ration it was dealing with so far only as was disclosed by the charter or articles of incorporation. The term "charter" to the council meant the written document which created the corporation. Undoubtedly they had copies of the written document, the articles of incorporation, before them. In those articles the common council undoubtedly read and well understood the following provision, being section 2 of the articles of incorporation (see fol. 59, rcd.):

> "2. The time of commencement of said corporation is the first day of July, A. D. 1873, and the period of continuance of said corporation is FIFTY YEARS THEREAFTER."

That is what the common council was talking about. It was not the technical, legal capacity of that corporation to exist for fifty years under the laws of the State. The council were talking about the fifty years mentioned in the articles, and when they passed section one of the ordinance of July 9, 1875, and referred to the charter of the company, they thereby embodied SECTION TWO of the charter in the ordinance, viz: "the time of the commencement of said corporation is the first day of July, 1873, and the period of continuance of said corporation is FIFTY YEARS THEREAFTER." See sec. 243, *Joyce on Franchises: Philadelphia, etc. Ry. Co.*, 143 Pa. St. 344. This section should be construed as if it had read "DURING THE PERIOD OF FIFTY YEARS MENTIONED IN SECTION 2 of the charter." This is undoubtenly what the common council meant at the time. That is the

construction most favorable to the city, and in our judgment is the construction that is controlling in this case, and we are therefore of the belief that the discussion about to follow, as to the technical questions of law in regard to the duration of this corporation under the enabling acts of the State are superfluous and unnecessary, and we shall undertake them only for the reason stated; because they have been pressed upon this court with so much earnestness by the able and conscientious counsel as to merit respectful consideration by us.

The validity of the charter, or whether it is under Title I or Title II would be wholly immaterial. This we believe is established by this court in *Interstate Consolidated Street Railway Co. v. Commonwealth of Massachusetts*, 207 U. S. 79. The syllabus in part reads:

> "Requirements contained in another statute or document may be incorporated in a charter by generic or specific reference and, if clearly identified, the charter has the same effect as if it itself contained the restrictive words and the question of the constitutionality of the statute referred to is immaterial."

At page 84 the court says:

> "If the charter, instead of writing out the requirements of Rev. L. 112, sec. 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter. The docu-

> ment, therefore, might as well be an unconstitutional as a constitutional law. See *Commonwealth v. Melville*, 160 Mass. 307, 308."

In discussing the first point made in the city's brief we shall assume that there are general laws under which companies can be incorporated to operate street railways, because the legislature in 1874 passed an act providing for the taxation of the property of street railroad companies (see section 14, ch. 1 G. L. 1874, p. 22, and section 11, ch. 1 G. L. 1878). Corporations could not be created by special act in 1873 because section 2 of art. 10 of the original state constitution, adopted in 1857, provided that "no corporation shall be formed under special acts except for municipal purposes." Counsel for the city in their brief say (p. 70):

> "It seems to us impossible to say that a street railway company might not properly be organized under the term *'transportation.' It is* transportation in the most simple and common sense. In fact, it is a business which has for its main, and we may add only, purpose, transportation. It certainly will not admit of doubt that transportation means, transporting, conveying or removing freight or passengers from one place to another. It seems like an oversight on the part of the learned judge of the Lower Court to assert that there was no specific enumeration in Title II of Chapter 34 of a kind of business which would include STREET RAILWAYS."

We shall, therefore, first devote ourselves to the proposition that street railways are not and cannot be incorporated under the word "TRANSPORTATION" UNDER TITLE TWO.

We shall then contend that the appellee was properly incorporated under Title I as a railway company; or as a work of internal improvement. We shall next contend that it is a corporation for the term of its charter, to-wit: 50 years by reason of the ratification of the ordinance of July 9th, 1875, by chapter 209 of the Special Laws of 1879.

THE APPELLEE WAS NOT AND COULD NOT HAVE BEEN INCORPORATED UNDER TITLE II, CHAPTER 34 OF THE REVISED STATUTES OF 1866 AND ITS AMENDMENTS.

We shall now devote our attention to the claim that appellee is incorporated under Title II, of Chapter 34, Revised Statutes, 1866. It is contended by counsel for appellant that the appellee is a corporation under the word "transportation" found in Title II. In other words, "transportation" means "street railway." It may be difficult to understand why the word "transportation" does not equally include the steam railroad of commerce. An examination of Sections 2841, and 2846, of Chapter 58, Revised Laws 1905, will, we believe, demonstrate that the word "transportation," does not mean "street railway." We will place these two sections side by side, as they appear in the Revision on opposite pages of the same chapter. Section 2841 appears on page 564 and Section 2846 appears on page 565:

2841. **Public Service Corporations.**—Corporations may be organized for the construction, acquisition, maintenance, or operation of any work of internal improvement, including railways, **street railways,** telegraph and telephone lines, canals, slackwater or other navigation, dams to create or improve a water supply or to furnish power for public use, and any work for supplying the public, by whatever means, with water, light, heat, or power, including all requisite subways, pipes, and other conduits. But no corporation so formed shall construct, maintain, or operate a railway of any kind, or any subway, pipe line, or other conduit in or upon any street, alley, or other public ground of a city or village, without first obtaining from, and compensating said city or village for, a franchise conferring such right.

2846. **Trading Companies, etc.,**—Corporations may be formed for any of the following purposes:

1. Constructing, leasing or operating docks, warehouses, elevators, public halls, or hotels.

2. Carrying on any kind of lumbering, agricultural, dairying, mercantile, chemical, **transportation,** or other lawful business not otherwise provided for in this chapter.

3. Buying, selling, and improving lands and tenements.

It is not likely that the legislature provided for the same thing twice within two pages of the same chapter. It is not likely that if it provided for street railways in Section 2841 it would also provide for the same thing (street railways) in Section 2846. In Section 2841 the legislature provided:

> "Corporations may be organized for the construction, acquisition, maintenance, or operation of any work of internal improvement, including railways, STREET RAILWAYS,"
> * * *

In Section 2846 the legislature provided:

> "Corporations may be formed for any of the following purposes:
> 1. * * *
> 2. Carrying on any kind of lumbering, agricultural, dairying, mercantile, chemical,

TRANSPORTATION, or other lawful business" * * *

If the word "transportation" includes street railways, there was no necessity of putting street railways in Section 2841. On the other hand, since "street railways" are provided for in Section 2841 they necessarily are not included in the term "transportation" in Section 2846. If "transportation" includes "street railways" we have two provisions in the same chapter for identically the same purpose. Under Sections 2841, 2842, and 2843, street railway companies are required, before they construct, maintain or operate a railway, to obtain from and compensate the city or village for a franchise. No such requirement is imposed under Section 2846. Under Section 2842 the state shall have at all times the right to supervise and regulate the business methods of street railway companies. Under Section 2846 there is no such burden placed upon transportation corporations. Under Section 2842 the state is given from time to time the right to fix the compensation which may be charged by street railway companies. No such authority is vested in the state as to transportation companies in Section 2846. Street railways may be bought by the municipality under Section 2843. No such provision obtains under Section 2846. All the provisions and limitations imposed upon street railway corporations under Sections 2842 and 2843 apply only to street railway corporations organized under Section 2841 and can not apply to a corporation organized under Section 2846. We subjoin some

further legislation showing that the legislature did not consider that the word "transportation" included "street railways." Chapter 1 of the General Laws of 1874 provides on page 22:

Section 14.

The Personal Property of STREET RAILROAD, plank road, gravel road, turnpike or bridge companies, shall be listed or assessed in the county, town or district where the principal place of business is located, and the track or bridge shall be held to be personal property.

Section 16.

The Personal Property of Express or TRANSPORTATION Companies shall be listed and assessed in the county, town or district where the same is usually kept.

Chapter one (1) of the General Laws of 1878, on page 21 thereof provides:

Section 11.

The Personal Property of STREET RAILROAD, plank road, turnpike or bridge companies, shall be listed and assessed in the county, town or district where the principal place of business is located, and the track, road or bridge shall be held to be personal property.

Section 9.

The personal property of express, **transportation** and stage companies shall be listed and assessed in the county, town or district where the same is usually kept. All persons, companies and corporations in this state, owning steamboats, sailing vessels, wharf-boats, barges, and other water-craft shall be required to list the same for assessment and taxation, in the county, town or district in which the same may belong, or be enrolled, registered or licensed, or kept when not enrolled, registered or licensed.

Sections 1519 and 1517, General Statutes 1894, provide as follows:

Section 1519.

Of STREET RAILROAD Companies, where listed, etc.

The Personal property of **Street Railroad,** plank road, gravel road, turnpike or bridge companies shall be listed and assessed in the county, town or district where the principal place of business is

Section 1517.

Property of TRANSPORTATION Companies, etc., Where to be Listed.

The personal property of express, **TRANSPORTATION and Stage Companies shall** be listed and assessed in the county, town or district where the same shall be listed and

located; and the track, road or bridge shall be held to be personal property.

assessed in the county, town or district where the same is usually kept. All persons, companies and corporations in this state, owning steamboats, sailing vessels, wharfboats, barges, and other water craft, shall be required to list the same for assessment and taxation, in the county, town or district in which the same may belong, or be enrolled, registered or licensed, or kept when not enrolled, registered or licensed.

Section 829 and 826, Revised Laws Minnesota 1905, provide as follows:

Section 829.
STREET RAILROAD Companies, etc.

The personal property of **Street Railroad,** plank road, gravel road, turnpike, or bridge companies, shall be listed and assessed in the county, town or district where the principal place of business is located.

Sec. 826 R. L. 1905, is:
EXPRESS COMPANIES, etc.

The personal property of express, stage, and **Transportation Companies,** except as otherwise provided by law, shall be listed and assessed in the county, town, or district where the same is usually kept.

It therefore seems we have here a demonstration that the word "transportation" now does not mean "street railway." It never meant street railway. If it did not mean street railways or railways in 1905 we think it did not mean railways or street railways in 1873.

The distinction between Title I and Title II has been clearly pointed out by our Supreme Court in *Brown v. Corbin,* 40 Minn. 510, where the court said, in speaking of corporations under Title II:

"The kinds of business specifically enumer-

> ated bear no common analogy to each other, except that they are all for pecuniary profit and of a strictly private character, as distinguished from those to be carried on by *quasi* public corporations authorized to exercise the right of eminent domain."

An examination of Title II will disclose the correctness of this statement by our court. Public service corporations are not covered or intended to be covered by Title II. Counsel for the appellant refer to the fact that gas companies may be organized under Title II. It will be noticed that only a company for the manufacture of gas is authorized under Title II. And it will be further observed that when the legislature provides for the organization of a company to manufacture and distribute gas to the public, its organization is provided for under Title I. While the organization of gas companies for the manufacture and distribution of gas was provided for in Title I (Chapter 74, Laws of 1893) the organization of companies to MANUFACTURE gas remained in Title II.

The word "transportation" and the word *"railroad"* have entirely different meanings. This was determined by this court in *Lake Superior &c. Ry. v. U. S.*, 93 U. S. 442, and at page 451 the court said:

> "But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of the understood distinction between railroads as mere thoroughfares, and the operations to be carried on upon them by means of locomotives and cars. This is manifest from the fact,

amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a RAILROAD COMPANY is not necessarily a TRANSPORTATION COMPANY, and that, to make it such, express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

The distinction between the terms "railway" and "transportation" or "railway company" and "transportation company," especially in the older charters, is illustrated in the following authorities:

Boyle v. P. & R. Ry., 54 Pa. St. 316.

Cumberland Valley R. R. Co.'s Appeal, 62 Pa. St. 228-9.

Penn. R. R. Co. v. Sly, 65 Pa. St. 205.

The Queen v. The London & S. W. Ry. Co., Vol. 1, Queen's Bench Reports, 574-5.

Great Northern Ry. Co. v. The South Yorkshire Ry. Co. & River Dunn Co., 9 Exchequer, 642.

Commonwealth v. Co., 66 Pa. 81.

Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307 (a pipe line).

West Virginia Trans. Co. v. Volcanic Oil Co., 5 W. Va. 382 (a pipe line).

Cambles v. P. & R. R. So., 4 Brewster (Pa.) 596-7-8.

State ex rel v. Iverson, 97 Minn. 286.

See also Vol. 1, *Elliott on Railroads,* Sections 4 and 6, and cases there cited and Vol. 3, *Elliott on Railroads,* Section 1096-B.

The appellee was created for the purpose of constructing a "RAILWAY." As a "transportation company" simply this may have been beyond its power. Hence the necessity of incorporation under Title I.

This meaning of the term "transportation" is adopted in our statutes. Section 1990, Revised Laws Minnesota, 1905, provide:

> "The term 'carrier' as used in this chapter shall include all common-carriers engaged in the transportation of persons or property between places within this state by railroad, or partly by railroad and partly by water, when both are used under a common control, ownership, management, or arrangement for such carriage, without regard to the motive power, whether such carrier owns or operates the line or lines over which such passengers or freight are transported, OR CARRIES THE SAME OVER THE LINES OR IN THE CARS OF ANY OTHER COMPANY AS AN EXPRESS OR TRANSPORTATION COMPANY, but shall NOT INCLUDE STREET RAILWAYS so far as relates to the carriage of persons or property wholly within the limits of any municipality or municipalities."

If "transportation" and "street railway companies" mean the same the above section of the statute is meaningless.

Counsel for appellant in their brief say that the opposing counsel are making the mistake of claiming or asserting that the laws of Minnesota have

provided for all kinds of corporations. As directed to this case we presume that amounts to an assertion that the appellee is mistaken in the belief that the laws of the State authorize the incorporation of street railway companies or companies capable of operating street railways if the authority therefor is not found in Sec. 45, Title II. That street railways do in fact exist we believe can be inferred from the law which provides for the taxation of street railway property. No corporation could be created by special act after the adoption of the constitution of the State in 1857, Article 10, Section 2, which provides that no corporation in this State except for municipal purposes shall be created by special act (R. S. 1866, p. 40). The legislature would hardly make laws for the taxation of street railways unless street railway companies were actually in existence. Chapter one of the General Laws of 1874 provides for the taxation of street railways. Chapter one of the General Laws of 1878 also provided for the taxation of street railways. This provision for taxing street railways has been continued through all our statutes and is now found in Revised Laws of Minnesota 1905, Sec. 829. We, therefore, claim that street railway companies, or railway companies capable of operating street railways, could in 1873, be organized under some general enabling act in the state. We have shown that street railway companies could not organize under Title II as transportation companies, and that is the only word counsel contend can apply to street railways in

Title II. It would therefore seem to follow that street railway companies must incorporate under Title I.

THE APPELLEE COMPANY WAS ORGANIZED UNDER TITLE I, CHAPTER 34, REVISED STATUTES OF MINNESOTA, 1866, AND THE AMENDMENTS THERETO.

THE CHARACTER OF A CORPORATION IS DETERMINED BY ITS CHARTER OR ARTICLES OF INCORPORATION. Its powers are fixed alone by its charter. That the charter and not the ordinances or agreements with municipalities creates and defines the character, power and period of existence of corporations is established by the following authorities:

In *Shreveport Traction Co. v. Kansas City, etc., Ry. Co.*, 44 So. 457, 5 Street Ry. Rep. 350, the court said:

> "In an examination for the purpose of ascertaining whether a body asserting itself to be a railroad corporation be legally such, and, if so, what its rights, privileges, and franchises are, we must refer, not to the relations between that body and the city authorities by whom it has been authorized to construct and operate railway tracks on its streets, either by permit, by way of license, or by way of contract, but to the STATE LAWS. The city authorities have no legal power to create corporations or to grant franchises. That power is lodged in the state. What the defendant refers to as 'franchises' have not that character in law. They are merely what are known as 'secondary franchises' that is to say, instrumentalities by means of which the corporate powers granted

by the charter may be exercised. In *Tilton v. Railroad Company,* 35 La. Ann. 1069, this court said:

"'The city does not grant franchises. This can be done by the state alone. But the city can concede the right of way through her streets, public places, and other property.'"

In *Southern Pacific R. Co. v. Orton,* 32 Fed. 458, the syllabus in part is:

"The right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grant, and which may or may not be given to corporations once created, as well as to natural persons, as to the legislature may seem advisable.

"The granting of independent franchises, other than the specific franchise constituting a corporation, and of other privileges and powers, to a pre-existing corporation, are not acts creative of a corporation, but ACTS REGULATING THE CONDUCT of the existing corporation in its relation to and intercourse with the public and other persons, natural and artificial."

In *Gould v. Fuller,* 79 Minn. 414, our court says:

"The powers of a corporation and the purposes for which it is organized must be determined by the ARTICLES OF INCORPORATION."

In *Merchant's National Bank v. Minnesota Thresher Co.,* 90 Minn. 144, our court held:

"The articles of an alleged manufacturing corporation are the SOLE CRITERION for determining the intention of the incorporators and the purpose for which the corporation was organized."

In *Bergman v. St. Paul Mut. Bldg., Assn.*, 29 Minn. 278, the court in its opinion says:

> "THE ARTICLES ARE ITS CHARTER, AND, SUBJECT TO THE CONSTITUTION AND GENERAL LAWS OF THE STATE, its fundamental and organic law. *Morawetz on Private Copr.*, sections 149, 367.
>
> *Craig v. Benedictine Sisters, etc., Assn.*, 88 Minn. 535-538;
>
> *Boom Co. v. Rainy River Boom Co.*, 97 Minn. 513;
>
> *Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate*, 101 Minn. 132;
>
> *State v. Thresher Co.*, 40 Minn. 213;
>
> *Bank of Winona v. Plow Co.*, 58 Minn. 167.
>
> *Thompson on Corporations*, 2nd Ed., Vol. 3, Sec. 2107, p. 14.
>
> *Joyce on Franchises*, Sec. 30.

The language quoted from the *Shreveport Traction Co. case* seems very pertinent here. To determine the character of a corporation:

> "We must refer not to the relations between that body and the city authorities by whom it has been authorized to construct and operate railway tracks on its streets, either by permit, by way of license, or by way of contract, but to the STATE LAWS. The city authorities have no legal power to create corporations or franchises. That power is lodged in the state."

The articles of incorporation of appellee constitute a complete answer to the claim that it was organized solely for the purpose of operating a HORSE RAILWAY in the streets of the city of

Minneapolis. Section 1 of the articles of incorporation provides (Fol. 59 rcd.):

> "The general nature of its business is to construct, and operate RAILWAYS in the streets and highways of the City of Minneapolis, and its suburbs, in the County of Hennepin, and State of Minnesota."

There is no limitation or qualification of the word "railway" in the above paragraph from the articles. It is not preceded by the word "horse," by the word "steam," by the word "electric," by the word "pneumatic" or BY ANY OTHER QUALIFYING WORD which limits it as to its motive power. These articles of incorporation of the appellee constitute the PRIMARY FRANCHISE from the State to the corporation and are the SOLE CRITERION by which the character of the corporation is to be determined. How can it be said that the character of the corporation, formed under the articles of incorporation referred to has been changed or modified as to motive power to be used, and especially as to its period of duration, simply because it entered into a contract with the city for a right to run railways upon the streets of the city? That the city has no power to amend the charter of a corporation or change its period of duration from 50 to 30 years seems obvious and needs not the citation of any authorities beyond those already given.

It is contended that the appellee cannot condemn, hence it is not incorporated under Title I of chapter 34. Every corporation organized

for the purposes only as specified in Title I has the power in proper cases to exercise the right of eminent domain and it can hardly be successfully contended that the appellee was without the power of condemnation when necessity required the exercise of that power. The articles of incorporation, from which we have just quoted provide not only for a railway in the streets and highways of the City of Minneapolis but also for a railway in the streets and highways of the suburbs of the City of Minneapolis in the County of Hennepin and State of Minnesota. This primary franchise or grant from the state contemplated the creation of a railway system connecting the City of Minneapolis with its suburbs by *means of one system of railways.* It meant ONE SYSTEM OF RAILWAYS. It did not mean one railway for Minneapolis and another for each of the suburbs of that city. That would be absurd. In 1873 when these articles were filed, what were the suburbs of the City of Minneapolis? The land contiguous and adjacent to the city, including the Villages of Excelsior, 18 miles away; Hopkins, 7 miles away; Robbinsdale, Osseo and St. Louis Park, distant 4 to 8 miles respectively, and the resorts of Lake Harriet, Lake Calhoun, Minnehaha Falls and Ft. Snelling, all in Hennepin County and distant several miles from the then boundaries of the city. If the appellee should operate a system of railway as contemplated in the articles how would this railway get across the intervening space lying between the City of Minneapolis and the suburbs, such as Ex-

celsior, Hopkins, Minnehaha and Ft. Snelling, except by appropriating private property for a right of way? A little thought makes it plain that it was within the contemplation of the appellee to construct a railway which might connect the city with its suburbs and it would necessarily follow in order to make that system a success that private property between the city and the suburbs must be appropriated under the power of condemnation. It might not condemn the streets and highways, for they are public property. Ordinances gave it the right to use streets. Consequently, and for that reason, the power of eminent domain might be unnecessary as to streets. It might, however, need the power of eminent domain for the purpose of crossing railroads, *Shreveport case*, 5 Street Railway Reports 350, and *Northwestern Telephone case*, 76 Minn. 334, for the purpose of making tunnels in the streets to avoid grades, to acquire locations for power plants, shops, offices, or for the purpose of avoiding unnecessary curves. That street railways now have the power of condemnation will not be successfully denied for in *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 214 and 215 the court say:

> "Railway corporations were recognized as public service corporations, and granted the right of eminent domain in this and other states, long before there were any statutes to regulate the conduct of their business or to fix the rates which they might charge. STREET CAR COMPANIES, TELEGRAPH AND TELEPHONE COMPANIES, AND GAS AND ELECTRIC LIGHT COMPANIES were recognized as public service corporations

> and given the power of eminent domain under similar conditions. All such corporations are nevertheless public service corporations, and because of the nature of the business in which they are engaged and the fact that they have been granted the power of eminent domain, are subject to reasonable state and municipal control whenever circumstances arise which require such control."

Nor is there any doubt but that street railway companies, especially street railways running into the country, always possessed the power of eminent domain when needed, just as much as telephone companies, which were held to have that right by the Supreme Court in *N. W. Tel. Co. v. Milwaukee Road*, 76 Minn. 334. Telephones had the right to use streets and highways (Ch. 73, Gen. Laws., 1881, and see 2641 Gen. St., 1894). The case of *Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate*, 101 Minn. 132, is abundant authority for the proposition that the Minneapolis Street Railway Company could at least condemn outside of the city limits, between the city and villages embraced in its suburbs. In no essential detail does the charter of the Suburban Company differ from the charter of the Minneapolis Street Railway Company, so far as relates to its power to condemn private property for a right of way outside of the city is concerned. The Suburban Company's right to condemn property was conferred (as the Supreme Court held in 101 Minn., at page 132, syllabus) by Section 2592 of the G. S. 1894. In no essential does this section differ from Section 1 of Title I, as it stood in 1873. The Lyndale & Minne-

tonka Railway Company (35 Minn. 112) was a railway corporation as its charter indicates (See page 142 Supplemental Brief). It had the power to condemn and did condemn. Of this there never was dispute. It was operating the Motor Line on First Avenue, in the City of Minneapolis, under contract with the City of Minneapolis (35 Minn. 122). The fact that the Lyndale & Minnetonka was operating what the court says was a street railway within the city did not lessen or detract from its power to condemn private property outside of the city limits. This contract with the city as to a secondary franchise in no manner interfered with its primary franchise or the power to condemn. The Suburban Company also had local franchises with municipalities. This did not detract from the power of condemnation. These cases establish, it seems to us beyond any doubt that the appellee under its CHARTER was a corporation endowed with the power of eminent domain.

In 1873 when the articles of the company were adopted there was no limitation therein upon the motive power to be used by the company or upon the character of the business which the company could transact. At that time it could have constructed a steam railway connecting Minneapolis with Excelsior or a line from Minneapolis to Fort Snelling or any other point within the County of Hennepin. The general nature of its business is to construct and operate railways in the *streets* and *highways* of the city of Minneapolis and in the

streets and *highways* in the suburbs. The words "street and highways" are either synonymous or the word "highways" refers to territorial and country roads. At that time Sec. 29, chapter 34, of Title I, R. S. 1866, provided:

> Sec. 29. If it becomes necessary, in the location of any part of a railroad, to occupy any road, street, alley, or public way, or any part thereof, it shall be competent for the municipal or other corporation or public officer, or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; or such company may appropriate so much of the same as may be necessary for the purposes of said road, in the same manner and upon the same terms as is herein provided for the appropriation of the property of individuals."

Before the acceptance of any secondary franchise from the City of Minneapolis there seems to be no reason why the powers conferred by said section 29, did not apply to this company, at least, so far as the territory lying outside of the city is concerned. Our court held that this section applied to the Minneapolis & St. Paul Suburban Railway Company, 101 Minn. 133. The court said:

> "The crossing of streets and alleys incidental to constructing a railroad from place to place does not constitute the occupancy of such streets or alleys for the purpose of operating a railway thereon within the provisions of section 2841, R. L. 1905; and a railroad company has the right to acquire by condemnation, under section 2916, R. L. 1905, a right of way over the streets and alleys of cities and villages, and

> over private property within such limits, without securing a franchise from the municipal authorities."

Section 2916, R. L. 1905, is the same as Section 29 quoted above. A provision similar to the above has been held to authorize municipalities to contract with street railways for the right to operate street railways in the street. In *Louisville Trust Co. v. Cincinnati,* 76 Fed. 308, the court says:

Section 12 of that act expressly provided how such street or highway rights might be obtained, that section being in these words:

> "Section 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act."

Under the decision in *Stillwater v. Lowry,* 83 Minn. 275, there may be some question whether our court would hold the above quoted section 29 to apply to street railways pure and simple although the question was evidently not considered very much

in that case. The contention of the City of Stillwater was disposed of in a line with the citation of the *Funk case,* without comment.

Before the acceptance of any ordinance from the City of Minneapolis the articles of the company, as we have already stated, were broad enough to authorize the construction of a steam railway between Minneapolis and some outlying suburb within the County of Hennepin, and the same reason which authorized the suburban company to condemn a right-of-way across the track of the Minneapolis & St. Louis Railroad Company under section 2916 R. L. 1905, would seem equally applicable to the Minneapolis Street Railway Company under similar circumstances. Has this right which the company apparently had, under section 29 of chapter 34, Title I, Revised Statutes 1866, been surrendered by reason of the acceptance of the ordinance of July 9, 1875? The authorities answer that question in the negative.

In *Abbott v. City of Duluth,* 104 Fed. Rep. 833, it appeared that a telephone company had the right under its original charter to maintain and extend its lines on all the highways of the state, in perpetuity. It accepted an amendment to its charter giving it exclusive rights in the streets of Duluth and West Duluth. This amendment was limited to ten years. It was held that its rights under the original charter were not lost by the acceptance of the amendment, but became revived at the expiration of the ten years. The court said (p. 838):

> "The acceptance by the company of the special exclusive rights granted by the special acts for a fixed time and presumably of value, cannot be construed as a refusal, disclaimer or surrender of the rights and powers granted to and vested in the company by the general law. There was no inconsistency. The company could receive and enjoy all the rights and powers given by the general law and the special acts. No election or disclaimer was required or expected. Both the general law and the special acts were beneficial, and will, therefore, be presumed to have been equally acted on and relied upon."

In *Town of Golconda v. Field,* 108 Ill. 419, it appeared that certain persons, being vested with title in fee to a ferry franchise, sought for and obtained from the general assembly a special act authorizing a ferry at the same place for twenty years. The Supreme Court said (p. 427):

> "The complainants, when the act of 1859 was passed, were in possession of the ferry franchise which had been conferred originally on Daniel Field, and descended to them. They had an undoubted right to hold and operate the ferry under the original grant. They did no act indicating an intention to abandon title to the ferry, but when the act of 1859 was passed they accepted its provisions, and held under it in connection with the original title. We do not think they waived any rights held under the original grant by accepting the provisions of the act of 1859, nor were they estopped from claiming under the original grant. If they thought the act of 1859 might strengthen their title to the ferry, we perceive no reason which would preclude them from accepting its provisions and at the same time retain the original title held by them when the act of 1859 was passed."

The same result seems to have followed from the ordinance granted by the City of Minneapolis to the N. W. Telephone Co., judging from the decision in the *N. W. Telephone Co. v. City of Minneapolis*, 81 Minn. 140. The telephone company had the right to use the streets and highways under and pursuant to statutory provision (See p. 152 of that decision, also chapter 12, G. L. 1860, and chapter 73, G. L. 1881, or Section 2641, G. S. 1894). The acceptance of the city ordinance was held not a waiver of that right.

The law in this state and the decisions of the courts relative to telephone companies are strikingly applicable on the question of the right of condemnation by the Minneapolis Street Railway Company, and we shall now discuss the similarity between telephones and street railways, and especially the similarity between the Northwestern Telephone Company and the Minneapolis Street Railway Company after it had accepted the ordinance of July 9th, 1875, and after its ratification by the special law of 1879. Neither the word "telephone" nor the words "street railway" appeared in the statutes in 1873, but both "street railway" and "telephone" appeared in chapter 74 of the General Laws of 1893, and in the same part of the chapter and in the same connection. Neither words appeared in the granting clause of that chapter; but both appear in the following proviso:

> "And provided further that the common-council of any city and the Board of Trustees

> of any village at the end of each and every five years from and after the granting of any franchise for the construction of any STREET RAILWAY, TELEPHONE, waterworks, gas and electric light, heat or power works, or any or all of them, shall have the right. * * * " etc.

At this time the street railway had a franchise or a right under the ordinance of 1875 to operate upon streets and highways of the City of Minneapolis. The telephone company had a right to occupy streets and highways under Section 2641, General Laws 1894, which read:

> "Any telegraph or telephone corporation organized under this title has power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same to sustain the wires or fixtures."

The word "telephone" did not appear in the granting part of section 1 of Title I, chapter 34, until 1905, when the words "street railway" and "telephone" appear simultaneously in section 2841, R. L. 1905, which in part reads as follows:

> "Corporations may be organized for the construction, acquisition, maintenance or operation of any work of internal improvement including railways, street railways, telegraph, and telephone lines."

From what has been said we see the remarkable similarity between the statutes applicable to street railway companies and telephone companies. From this we shall claim that the law which is applicable to telephone companies as to condemnation will be equally applicable to street railway companies un-

der like conditions. We call the court's attention again to the *N. W. Telephone Exchange Co. v. Milwaukee Road,* 76 Minn. 334, at page 339, where we find the following abstract of the brief of the Northwestern Telephone Company before our Supreme Court as to its right to condemn a crossing over the right of way of the Milwaukee Road. Counsel for the Telephone Company said:

> "The petitioner has the right of eminent domain conferred on it not only as a telegraph and telephone company, but ALSO AS A WORK OF INTERNAL IMPROVEMENT."

The court, speaking through Judge Collins, at page 345, thus adopts counsel's contention:

> "Unquestionably, a line constructed, as is proposed by plaintiff, for public use, for the transmission of intelligence by wire, whether it be, technically speaking, a telegraph or a telephone line, is a WORK OF INTERNAL IMPROVEMENT. *Rippe v. Becker,* 56 Minn. 100, 57 N. W. 331; *Cater v. N. W. Tel. Exchange Company,* 60 Minn. 539, 63 N. W. 111. Therefore its corporate owners may obtain its right of way by condemnation proceedings, as provided in G. S. 1894, Sec. 2604."

It will be noticed that the telephone company had the right to use the streets and highways, but its right to cross the railroad was contested. It sought to condemn outside the city. The court held it had the right so to do. That establishes the proposition that the Northwestern Telephone Exchange Company was invested with the power of eminent domain.

Now let us take the Minneapolis Street Railway Company and place it under like conditions. At-

tached to the Supplemental Brief is a map of Hennepin County, and the City of Minneapolis, with the boundaries of the City as they were in 1873 and 1875. At that time the Milwaukee Road extended through the city from Fort Snelling, in a westerly direction, between Lakes Calhoun and Lake-of-the-Isles, thence in a southwesterly direction to Hopkins. If the Minneapolis Street Railway Company desired to build a line from the center of the City of Minneapolis to the suburbs, or to its summer resorts, it might be necessary to cross the Milwaukee Road. If it desired to build a street railway, destined for Lake Harriet,—a suburb of Minneapolis,—it would be compelled to cross the Milwaukee Road outside of the City Limits. Suppose the Milwaukee road objected as it did to the crossing of its right of way by the Northwestern Telephone Exchange Company, can there be any doubt but that the Supreme Court would have applied the same rule to the supposed case that it did apply to the telephone case, above cited? There seems to be no escape from the conclusion that the court would be bound to hold the same rule to be applicable and that would of necessity establish the proposition that the Minneapolis Street Railway Company is invested with the power of eminent domain. We are not without authority or illustration of an actual case like the one supposed. This identical situation was presented in *Shreveport Traction Company v. Kansas City, etc., Ry. Co.*, 119 La. 759, 44 So. 457, 5 Street Railway Reports 343, at page 356, where the court said:

"Our statutes authorizing the incorporation of 'railroads' make no distinction between a commercial railroad and a street railroad. The latter must be incorporated as a railroad or not at all, and if a railroad, then the power to cross other railroads is necessarily implied from its very creation. Of course, there are many differences between the regular railroad and the street railroad; but both are common carriers and *quasi-public* corporations. Street railroads are usually, but not necessarily, confined to the use of the public streets. They may have in part a right of way of their own, and often expand into suburban and interurban railways. TO DENY SUCH RAILWAYS THE RIGHT TO CROSS OTHER RAILROADS WOULD BE TO CONFINE THEIR EXPANSION AND USEFULNESS WITHIN NARROW LIMITS. In the case at bar the plaintiff company, as authorized by its charter, is endeavoring to extend its line beyond the boundaries of the City of Shreveport. In order to do so it is necessary that it should cross the track of the defendant railroad. It has an *implied right* to do so as a means *necessary to carry out the public purpose* for which it was incorporated. It also has the *constitutional right* to do so as a RAILROAD CORPORATION. Ever since the adoption of the Revised Statutes of 1870 street railroads have been incorporated, organized, and operated under general provisions relating to 'RAILROADS.'"

This is the condition with which the Minneapolis & St. Paul Suburban Railway was confronted when it attempted to build to the Village of Excelsior. In that case, 101 Minn., on page 151, the court says:

"The respondent, the Minneapolis & St. Louis Railroad Company insists that there is

no authority for appellant company to acquire the right of way over respondent's tracks. Most of the objections urged are based upon the assumption that appellant was organized as a street railway, strictly speaking, and require no special notice. In the petition the appellant sets out the fact that it is necessary to cross respondent's railroad track at a certain point, and alleges that it has been unable to agree with that company upon the amount of compensation, or upon the character of the safety devices to be used at such crossings, and prays for the direction of the court with respect to that matter, alleging that it is the desire of the appellant to condemn the easement and right to cross the railway at that point. Conceding that section 2642, G. S. 1894, made no provision, strictly speaking, for condemning an easement by one railroad company over the tracks of another, appellant is authorized to exercise such right by the provisions of section 2915, R. L. 1905; for the right conferred by the latter is not limited to companies organized thereunder, but extends to corporations organized under the former, unless otherwise provided."

We have thus far, in order to show that the company was incorporated under Title I, and not under Title II, Chapter 34, shown that it declared in its articles of incorporation (Fol. 59 rcd.) that the "general nature of its business was to construct and operate RAILWAYS" and that neither "railway" nor "street railway" appears in Title II, but it appears only in Title I of Chap. 34, R. S. 1866. We have shown that under the charter the appellee is entitled to condemn just as much as the Minneapolis & St. Paul Suburban Railway Company, the Minneapolis, Lyndale & Minnetonka Railway Com-

pany or the Northwestern Telephone Exchange Company. This is a strong reason why it belongs under Title I and not under Title II.

For the purpose of further demonstrating that the company incorporated under Title I, and not under Title II, we call attention to the fact that it violated several of the requirements of Title II and complied with all the provisions and requirements of Title I in the filing of its articles of incorporation. As to its period of duration it complies with Title I and violates Title II. The second paragraph of the articles of incorporation provides:

> "The time of the commencement of said corporation is the first day of July, A. D., 1873, and the period of continuance of said corporation FIFTY YEARS thereafter."

In paragraph 7 of the articles of incorporation it is provided:

> "The number and amount of shares of capital stock of said corporation shall be 2500 of $100 each."

Section 47 of Title II, of said chapter 34, provided that the shares should not be less than TEN (10) nor more than FIFTY ($50) dollars each, except in cases of Building and Loan Associations when the shares should be TWO HUNDRED dollars each.

These are strong arguments in favor of our contention that the articles were filed under Title I and not under Title II.

We shall next show the legislature recognized that articles of incorporation identical with the

articles of company properly created a corporation under Title I and not a corporation under Title II of said Chapter 34.

The Duluth Street Railway Company filed articles of incorporation (See page 113, Supplemental Brief), identical with the articles of incorporation of the appellee. By chapter 200 of the special laws of 1881 (Extra Session) (See page 97, Supplemental Brief) the Legislature of the State said:

> "The Duluth Street Railway Company, a *corporation organized and existing under the general railroad law of the state*, be and is hereby granted during the term of its charter the exclusive right and privilege of constructing and operating a single or double track for a passenger railway, etc."

In what clearer manner could the legislature have recognized or declared that the Duluth Street Railway Company was properly incorporated under Title I of chapter 34? The Supreme Court in *State v. Duluth Gas & Water Co.*, 76 Minn. 107, also recognized that the Duluth Street Railway Company was organized under chapter 34, Title I, of the Revised Statutes of the State, when the Court said:

> "The Duluth Street Railway Company was organized under G. S. 1894, chapter 34, Title I, and acts amendatory thereof."

To further make certain our said claim that the company is a corporation under Title I, let us examine some of the amendments that have been made to Title I. It will be found that all amendments which in any manner refer to street railways are

to Title I, and never to Title II, for the legislature considered that railway companies of the kind appellee is MUST INCORPORATE UNDER TITLE I, and could not incorporate under Title II. Title I was amended by Chapter 74 of the General Laws of 1893, which became Section 2592 of G. S. 1894. Chapter 74 (Sec. 2592) reads as follows:

> Section 1. That section one of title one of chapter thirty-four of General Statutes, 1866, be and the same is hereby amended so as to read as follows, that is to say:
>
> Section 1. Any number of persons, not less than five, may associate for incorporation and become incorporated under and according to this title for the construction, maintenance and operation of any work or works of internal improvement requiring the taking of private property, or any easement therein, for public use, including railways, telegraph lines, canals, slack water or other navigation upon any water course, bay or lake, dams to improve or create a water supply or power for public use, and any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power; and any citizens of the United States, not less than nine in number owning any RAILWAY now or hereafter constructed for public use within this state for transportation of persons or property, or organized for the purpose of maintaining and operating under any lease or contract a railroad constructed for like public use, may, by making and filing articles of association under and according to this title, acquire and enjoy the rights, powers, privileges and franchises hereinafter granted and may, by filing in the office of the secretary of state a resolution of such corporation expressing its intent to construct, maintain and operate any branch line,

become empowered to construct, maintain and operate the same in connection with its main line, subject, however, to the provisions of this title and the general laws of this state, and any corporation formed hereunder may construct, maintain and operate telegraph lines along or over its lines of railroad, and any corporation formed hereunder or under any act hereby amended, may charge and collect a reasonable compensation for its service. But no corporation formed under this title shall have any right to construct, maintain or operate upon or within any street, alleys or other highway of any city or village a RAILWAY OF ANY KIND or any subway, pipe-line or other conduit for supplying the public with water, gas light electric light heat power or transportation, or any improvement of whatsoever nature or kind, without first obtaining a franchise therefor from such city or village according to the terms of its charter and without first making compensation therefor, as herein provided.

PROVIDED, THAT THE STATE OF MINNESOTA SHALL AT ALL TIMES HAVE FULL POWER AND AUTHORITY TO SUPERVISE AND REGULATE THE BUSINESS METHODS AND MANAGEMENT OF ANY CORPORATION EXISTING AND OPERATING HEREUNDER, AND SHALL ALSO HAVE FULL POWER AND AUTHORITY AT ALL TIMES TO FIX THE COMPENSATION WHICH SHALL OR MAY BE CHARGED OR RECEIVED BY ANY CORPORATION EXISTING AND OPERATING HEREUNDER. AND ANY CORPORATION ORGANIZED UNDER THIS ACT SHALL BE SUBJECT TO ANY CONDITION FROM TIME TO TIME IMPOSED BY SUCH VILLAGE OR CITY, THROUGH ITS BOARD OF TRUSTEES OR CITY COUNCIL. And *Provided Further*, that the common council of any city and the board of trustees of any village at the end of each and every five years from and after the granting of any franchise for the construction of any STREET RAILWAY, TELEPHONE, waterworks, gas and electric light, heat or power works, or any or all of them,

shall have the right, when authorized so to do by a two-thirds vote of the electors of such municipality as hereinafter provided, to acquire the same by purchase and thereafter operate the same, upon paying to the company, corporation or person owning the franchise the full and true cost and value thereof, to be determined by the usual proceedings for acquiring public property for public use under the right of eminent domain upon petition of the authorities of such municipalities, except that none of the commissioners so appointed to appraise the same shall be residents of said municipality, and except further that all the property, if any thereof, owned by the corporation in interest under and in connection with said franchise shall be included in such proceeding and purchased and acquired hereunder.

Before any such property shall be acquired by any municipality or such proceedings be instituted the proposition to acquire the same shall be submitted to a vote of the electors of said municipality at a special election called for that purpose within the three months immediately prior to the expiration of any five years of said franchise and then only when authorized by two-thirds of the votes cast at said election.

The consideration paid for any such works or property acquired under this provision shall be first applied to the payment of any bonds upon the property or works acquired and the balance if any to the person, company or corporation owning said franchise.

The following from Chapter 74, unmistakably refers to street railways:

"But no corporation formed under this Title shall have any right to construct, maintain or operate upon or within any street, alleys, or other highways of any city or village, a RAIL-

> WAY OF ANY KIND * * * without first obtaining a franchise therefor from such city or village."

Street railways alone need a franchise from the city. The steam railroad of commerce can condemn the right through the street, so does not need a franchise from the city. Chapter 74 further provides:

> "The common council of any city and the board of trustees of any village at the end of each and every five years from and after granting any franchise for the construction of any *street railway*, telephone, waterworks, gas * * * shall have the right to acquire the same by purchase upon paying to the company * * * the cost and value thereof."

It is not likely that the legislature would amend Title I, Chapter 34, and add thereto a provision like the above relative to the purchase of street railways by municipalities, unless it was the belief of the legislature that street railway companies were properly incorporated under Title I and not under Title II, nor is it likely that the legislature would provide as an amendment to Section 1 of Title I that any company incorporated thereunder must secure a franchise from the municipality before it could construct or operate a railway of any kind upon the streets of cities or villages unless it was the understanding of the legislature that street railway companies were properly incorporated under said Title I. This intention seems to be carried out in the Revision of 1905, for Section 2592 of the General Statutes of 1894 became Sections 2841, 2842, and 2843 of the Revised Laws of 1905.

Sec. 45, Title II, of Chapter 34, R. S. 1866 (Sec. 2794 Gen. St. 1894) is preserved in the Revised Laws of 1905 in Sections 2844, 2845, 2846, 2847 and 2848 thereof.

We shall next call attention to the practice of incorporating companies for the operation of street railways. Counsel for the appellant, in their brief, on page 72, make the statement that it is the understanding of the profession that companies for the operation of street railways could not be organized under Title I. This invites an answer. In this counsel is clearly in error. The fact is that not one street railway charter has been filed in the office of the secretary of state, so far as diligent search can disclose, under Title II of said Chapter 34. The only company attempting to file under Title II was the Minneapolis & St. Paul Suburban Railway. The Supreme Court, however, held that the articles properly belonged under Title I. See *Suburban case*, 101 Minn. 132. The Anoka Street Railway stated in its articles that it was incorporated under Title II, but it provided for a duration of fifty years, which conflicts with the provisions of Title II. These are the only exceptions to the statement above made that all street railway companies in Minnesota are incorporated under articles filed under Title I and not under Title II. This continued practice is strong, if not conclusive, evidence that Title I is the proper place under which street railway companies should incorporate.

In *re Washington Street Ry. Co.*, 115 N. Y. 442, the court said:

> "The uniform recognition on the part of the officers of the state government of the right to file articles of association of street railroad companies under the general railroad act of 1850, and of the legality of this kind of corporations thus formed, is very considerable, if not controlling, weight in the interpretation of said act."

The Winona Street Railway Company was organized under Title I. The articles of incorporation for that company were prepared by Mr. Thomas Wilson, then of the city of Winona, one of the commissioners who prepared the Revised Statutes of 1866 (See p. IV, R. S. 1866), one of the best posted men upon the subject of corporation law, once a judge of our Supreme Court. It was his judgment that street railways were properly organized under Title I instead of Title II (See p. 134 of the supplemental brief for copy of the articles filed by that company). The Minneapolis Horse Railway Company was organized in 1867 under Title I, and for the term of fifty years (see p. 130 of the supplemental brief). The word "transportation" did not appear in Title II until 1868. It was taken out in 1869 and finally reinserted in 1870 (p. 79 Sup. Brief). Did this legislation make the incorporation of the Minneapolis Horse Railway illegal?. The articles of the Duluth Street Railway Company (a copy of which may be found at p. 113 of the supplemental brief) were also filed under Title I, and these articles are identical with the articles filed by the appellee.

The articles of the Duluth Street Railway Company were prepared by Mr. W. W. Billson, one of the best posted men on the law of corporations in the state and thoroughly familiar with the Revised Statutes of Minnesota, 1866. This Duluth charter is the one referred to by Supreme Court when it said that the Duluth Street Railway Company was organized under the general railroad law of the state. The St. Paul City Railway Company was organized under Chapter 30 of the General Laws, 1876 (pages 110 and 102, supplemental brief), which was an amendment of Title I, of Chapter 34, Revised Statutes, 1866. That was an act providing for the foreclosure of railroad company mortgages and for the creation of corporations to purchase at foreclosure sale to operate the property. (*Nash v. Lowry*, 37 Minn. 261-262). Mr. Harry J. Horn, also a well posted man on corporation law, prepared the articles of incorporation for that company. The articles of the Minneapolis Street Railway Company were prepared by D. A. Secombe. No one acquainted with Mr. Secombe will deny but that he generally knew how to prepare articles of incorporation under the statutes of Minnesota. Many articles were filed designed to cover the construction and operation of street railways, among them: Brainerd Street Railway Company, Stillwater Street Railway Company, Tower & Soudan Street Railway Company, Mankato Street Railway Company, Mankato Electric Street Railway & Power Company, The St. Cloud Street Railway Company, and others which might be named, and all of them

were organized under Title I and not under Title II (pages 127 and 121, of Sup. brief).

So much for the practice of the profession in filing articles of incorporation for street railway companies. This practice, as we see, is uniform and in conflict with the statement and contention of counsel for the city. The officers of the state would be compelled to examine the articles. They must pass upon the right to file them. This would constitute a practical construction of the law by the officers of the state which can not easily be brushed away. It has continued since 1867. In case of doubt such practical construction should be conclusive upon the courts (See *Lewis' Sutherland Statutory Construction,* Vol. 2, 2nd Ed., p. 886).

Chapter 30 of the General Laws of 1876, page 102, Supplemental Brief, is the only authority that street railways possess in this state to mortgage their properties, and the only act which permits the mortgagees to incorporate after foreclosure so as to get possession and operate the property after foreclosure. The words "street railway" or "street railway company" are not mentioned in that act. Unless the term "railroad" or "railway" in this act includes street railway or street railway companies, all the street railway mortgages in this state are invalid. Unless said Chapter 30 is applicable to street railways, street railways and street railway companies are impossible in the State of Minnesota because no street railway can be built of any magnitude without borrowing large sums of money and

issuing mortgages and trust deeds to secure the payment of such money. Railways and street railways would be impossible unless such corporations could mortgage their properties as security for large loans in order to engage in enterprises of such vast magnitude that no individual or collection of individuals could possibly have sufficient funds to finance the enterprise.

We shall next call attention to the fact, and cite authorities thereto, that it is not uncommon for street railways to incorporate under general railroad acts where there is no enabling act applying specially to street railways, and it will be further shown by these authorities that under such circumstances street railway companies have generally the same powers as to condemnation as the powers possessed by railroad companies.

Cook, in his *Work on Corporations,* 6th Ed., Sec. 915, says:

> "Where there is no statute in a state relative to the powers of street railroads, the courts hold that they have generally the same powers that are given by statute to steam railroads."

In 15 Cyc., page 574, the author says:

> "Corporations organized under general laws have all the powers of condemnation granted by such general laws or by the statutes of the state. This doctrine has been held to apply to electric railways, to horse railways in a city, and to street railways generally."

In the case entitled *In the Matter of the Proceedings by the Washington Street Ry. Co.,* 115 N. Y. 442, the court says:

> "Corporations for transporting passengers or freight by horses as a motive power over railroads in the streets of cities in this state, except the city of New York, may be formed under the general railroad act of 1850 (Ch. 140, Laws of 1850) and its amendments. * * * The fact that said Act of 1850 contains provisions which can only be applied to railroads using some other motive power than horses, furnishes no argument against the application of its other sections to horse railroads. The uniform recognition on the part of the officers of the state government, of the right to file articles of association of street railroad companies under the general railroad act of 1850, and of the legality of this kind of corporations thus formed, is very considerable, if not controlling, weight in the interpretation of said act."

Chapter 140 Laws of New York, 1850, section 1, read as follows:

> "Any number of persons NOT LESS THAN TWENTY-FIVE may form a corporation for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property."

Cook, in his *Work on Corporations*, Section 912, as to the customary incorporation of street railways under a general railroad act, says:

> "Street railways came into use about the year 1850, being twenty years later in their origin than steam railroads. In New York one of the first street railways was the outgrowth of an omnibus line and at first differed but little from it except in the fact that it was confined to a track. So little in fact was the importance of street railways understood in those days that no act was provided for their incorporation. In New York from 1850 to 1884 all street railways were incorporated under the general steam railroad act."

Street railways existed, consequently, for 23 years before 1873, the time when appellee was incorporated. So street railways were not unknown at the time of the revision of our statutes or in 1873.

In *Lieberman v. Chicago Rapid Transit Co.,* Vol. 141 Ill. 141, the syllabus in part is:

> "The act of 1872, which provides for the incorporation of companies 'for the purpose of constructing and operating any railroad in the state,' applies to elevated railroads. Therefore, a railway company incorporated under that act, with authority to construct a railroad, without qualification or limitation as to its character, is authorized to construct an elevated railroad."

The court says on page 148:

> "A question of construction bearing a close analogy to the one we are here considering arose in *Bishop v. North,* 11 Mees. & Wels. 418. There a statute passed in 1792, and long before steam railroads had an existence, provided, in substance, that in case the proprietor of any manor or estate containing any mines or coal or other minerals should find it expedient or necessary to make any railway or road to carry his coal, etc., over the lands of any other person, it should be lawful for him to make such railway or road, he first paying or tendering satisfaction for the damages to be thereby occasioned to such lands. In 1843 the question arose whether under that act, a railway could be built over the lands of another on which steam cars and engines were to be used, it being contended that railways which required locomotive engines were not and could not have been contemplated by said act, no such railway being then in existence. The court, in holding that the act included steam railways, said: 'The power given by the act is

to make any railway; and it is not shown that the term railway has any definite meaning requiring it to be made on a level; and I cannot think it can be qualified by showing that, at the time of the passing of the act, a particular species of railway, unlike the one contemplated, was in use. The power is general, to make railways over the lands or grounds of any person or persons, making satisfaction for the damage occasioned thereby."

In *City of Clinton v. Clinton & Lyons Horse Railway Co.*, 37 Iowa, page 61, the syllabus in part is:

"Street railways: RIGHT OF WAY ACT. The provisions of our statute respecting the appropriation of the right of way for railroad companies, applies as well to railways operated by animal power as to those operated by steam."

In *Lewis' Sutherland Statutory Construction*, Vol. 2, Sec. 472, on this subject it is said:

"For more than twenty-five years street railroad companies had been formed under the general railroad law of New York. Some of its provisions were such as could be applied to such companies, and some were not. When the right was questioned it was held that this long practice and the acquiescence of the officers of the state therein was of a very considerable if not controlling weight in the construction of the act, and the practice was confirmed."

In *City of Rochester v. Rochester Ry. Co.*, 182 N. Y. 113, the court says:

"In 1862 the Rochester City & Brighton R. R. Co. was incorporated under the general railroad act of 1850 (Ch. 140) for the purpose of operating a street railroad on certain streets

in the city of Rochester, extending into an adjoining town. That statute authorized the incorporation under it of street surface railroad companies (Matter of *Washington Street, etc., R. R. Co.,* 115 N. Y. 442). This proposition was never questioned until the decision of this court in the *Matter of New York Cable Co. v. Mayor* (104 N. Y. 1), and, in fact, most of such companies outside of the old city of New York were organized under that statute. Whatever doubts were cast on the application of the general railroad act to street railroads by the opinion in the *Cable Company case* were removed by the decision in the *Washington Street case,* where the remarks in the earlier case were expressly retracted," etc.

In 10 Am. and Eng. Cyc. 1079 the author says:

"Like any ordinary railroad, a street railroad is of a *quasi public* nature and its use a public use. It is a common carrier of passengers and the right of eminent domain may be exercised in its behalf in order to secure a right-of-way."

In the following cases street and suburban railways were held to possess power of condemnation:

Gillette v. Ry., 228 Ill. 261.

M. & St. P. Sub. Ry. v. Manitou Forest Syndicate, 101 Minn. 132.

State ex rel Harris v. Olympia, 90 Pac. Rep. 656.

State v. Centralia, etc., 85 Pac. Rep. 344.

Malott v. Ry. Co., 108 Fed. 313.

Mull v. Traction Co., 169 Ind. 214.

Hartshorn v. Ill., etc., Traction Co., 210 Ill. 609.

15 *Cyc.* 574, and cases there cited.

10 *Am. & Eng. Ency, of Law,* 1079, and cases in Note 3.

People v. Kerr, 27 N. Y. 88.

Toledo El. St. Ry. v. Toledo, etc., Ry., 11 Ohio Dec. 365.

It is contended by the city that the word "railway" found in Title I excludes the appellee from being incorporated under that title. Several decisions are cited to the effect that under the particular statutes the word "railroad" has been interpreted to mean solely the steam railroad of commerce. Our contention is that the word "railway" accurately describes the corporation formed by the charter of the company. The charter or articles of incorporation does not limit the company to either "horse" or "street" railway. Its articles of incorporation are broad enough to cover a railway operated by any motive power and compelled to exercise eminent domain if the purpose stated in the articles is carried out of building one system of railways connecting the City of Minneapolis with its suburbs. THE WORD "RAILWAY" OR "RAILROAD" IS THE GENERIC TERM AND COVERS ALL CLASSES OF RAILWAY. There is no reason why the word "railway" does not accurately describe the enterprise outlined in the articles of incorporation of the appellee. In this connection we will call the court's attention to some of the decisions where the word "railroad" or "railway" has been defined and where it has been applied even to the ordinary street railway.

In *Shreveport Trac. Co. v. Kansas City, etc., Ry.* 5 St. Ry. Rep. 343, 119 La. 579, 44 So. 457, it is stated that the Shreveport City Ry. Co. was organized under the Revised Statute of Louisiana reading as follows:

> "It shall be lawful for any number of persons not less than six, on compliance with the provisions following, to form themselves into and constitute a corporation for the following purposes, to-wit: for the construction, working and maintenance of railroads, canals, plank roads, bridges, ferries, and other works of public improvement, whether within or without the limits of the state * * * and generally all works of public utility and advantage."

The Shreveport City Railway Company was consolidated with another company and formed the Shreveport Traction Company. The court in this case analyzes *Massachusetts Loan Co. v. Hamilton*, 88 Fed. 588, and on the subject of the meaning of the term "railroad" says (5 St. Ry. Rep. 356):

> "Our statutes authorizing the incorporation of 'railroads' make no distinction between a commercial railroad and a street railroad. The latter must be incorporated as a 'railroad' or not at all, and, if a railroad, then the power to cross other railroads is necessarily implied from its very creation. Of course, there are many differences between the regular railroad and the street railroad; but both are common carriers and *quasi-public* corporations. Street railroads are usually, but not necessarily, confined to the use of the public streets. They may have in part a right of way of their own, and often expand into suburban and interurban railways. To deny such railways the right to cross other railroads would be to confine their

expansion and usefulness within narrow limits. In the case at bar the plaintiff company as authorized by its charter, is endeavoring to extend its line beyond the boundaries of the City of Shreveport. In order to do so it is necessary that it should cross the track of the defendant railroad. It has an implied right to do so as a means necessary to carry out the public purpose for which it was incorporated. It also has the constitutional right TO DO SO AS A RAILROAD CORPORATION. Ever since the adoption of the revised statutes of 1870 street railroads have been incorporated, organized, and operated under general provisions relating to 'RAILROADS.' The latest act on this subject authorizes the creation of corporation 'for the construction, working and maintenance of railroads.' Act No. 154 of 1902. In the same way all of our expropriation statutes confer the right of eminent domain on 'any corporation constituted under the laws of this state for the construction of railroads.' Section 1479 of the Revised Statutes of 1870; Act No. 96, p. 142, of 1896; Act No. 227, p. 457, of 1902. It follows, we think, that street railroads and electric railroads are within the generic term 'railroad' as used in our constitution and statutes, in so far as the provisions of the same are applicable to that kind of railway. Prior to 1898 we find no special legislation relative to street railroads. As to the right of crossing the tracks of other railroads, declared to be 'public highways' by the organic law, there is no difference in principle between a street railroad and a commercial railroad. The necessity is the same in both cases, and the reason and spirit of the law is the same. A recent act of the legislature empowered police juries to grant and sell franchises on and across the public roads and highways for the construction of railways using electric or any other motive power than steam. Act. No. 48, p. 63, of 1906. The plaintiff has acquired such

a franchise; but its exercise is impossible, if plaintiff has not the right to cross intervening railroad tracks. We think that the right of crossing each other's tracks is vested in all railroads, not only by necessary implication but by express law. It is not necessary to decide whether street railroads have the power OF EMINENT DOMAIN IN OTHER RESPECTS."

Nellis St. Ry. Law, p. 13.

Roddy v. Ry., 32 App. Div. 311.

In *McCleary v. Babcock, Treasurer, et al*, 169 Ind. 228, the court said:

"The word 'railroad' is a generic term, and as used in general statutes includes all kinds of public service roads composed of fixed metallic rails upon which are transported cars containing passengers or freight."

Whether the term "railroad" includes or excludes street railways depends upon the context in which the word is used. *Lewis' Sutherland's Statutory Construction*, Vol. II, page 772; *Elliott on Railroads*, Vol. I, Sec. 46; Vol. III, Sec. 1096-b, p. 49. *Nellis Street Surface Railroads*, page 3, note 7; page 6, page 13 and note 24.

In the following cases the term "railroad" included street railways:

Shreveport Traction Co. v. Kansas City, etc., Ry., 5 St. Ry. Rep. 343.

People v. Willison, 86 Me. 1094.

In *re Washington Street Railway*, 115 N. Y. 442.

Central National Bank v. Worcester, 13 Allen 105.

Citizens' Passenger Railway v. Pittsburgh, 104 Pa. St. 552.

17 *A. & E. Railway Cases,* 438.

Hestonville Ry. Co. v. Philadelphia, 89 Pa. St. 210.

Gyger & Phil. Ry. Co., 136 Pa. St. 96.

Millville v. Evergreen Ry. Co., 131 Pa. St. 1.

Birmingham, etc., Ry. Co. v. Jacobs, 92 Ala. 200, 9 So. 320.

Katzenberger v. Lavo, 90 Tenn. 235.

Roddy v. Ry., 32 App. Div. 311.

Cherokee Nation v. Georgia, 5 Pet. 1, p. 19.

Egan v. Street Ry. Co., 78 Conn. 291-295.

Chicago v. Evans, 24 Ill. 52.

Sparks v. Philadelphia Ry. Co., 212 Pa. St. 105.

Price v. State, 74 Ga. 378.

Savannah, etc., Ry. Co. v. Williams, 117 Ga. 414, 61 L. R. A. 249.

Rafferty v. Ry. Co., 147 Pa. St. 579.

Bloxham v. Consumers, etc., Co., 36 Fla. 519, 29 L. R. A. 507.

Ingersall v. R. R., 157 N. Y. 453.

Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 342, 76 Fed. 296.

Harvey v. Ry., 174 Ill. 295.

In the Matter of the Petition of So. Beach Ry., 119 N. Y. 141.

Metropolitan St. Ry. Co. v. Chicago West Div. Ry., 87 Ill. 317.

Hannah v. Railway, 81 Mo. App. 82.

People v. Brooklyn Ry., 89 N. Y. 75.

Button v. St. Ry., 4 S. W. 332.
Clinton v. Clinton, etc., Ry., 37 Iowa, 61.
Oler v. Ry., 41 Md. 583.

Funk v. St. Paul City Railway Company, 61 Minn. 435, is relied upon by the appellant to establish their claim that the term "railroad" does not include street railways. In that case an action was brought under the so-called fellow-servant law of our state, Chapter 13 of the General Laws of 1887, which provided that ANY RAILROAD company operating a RAILROAD within this state shall be liable to an employe for the negligence of a fellow servant. This fellow-servant law came very near being unconstitutional as "special legislation," and in order to sustain the constitutionality of the act it was found necessary by the Supreme Court of the state in *Lavalle v. R. R. Co.*, 40 Minn. 249, and *Johnson v. Ry. Co.*, 43 Minn. 222, to HOLD that it applied solely to the *peculiar hazards and dangers of railroading.* There were no "peculiar hazards" and dangers of railroading connected with the operation of the St. Paul City Railway Company, and for that reason the court HELD in the Funk case that the term "railroad" in the "fellow-servant law" did not mean street railways because the dangers peculiar to railroads were not present. That the court did not intend to say that the word "railroad" never meant street railway and always means ONLY THE STEAM RAILROAD OF COMMERCE is evidenced by the fact that the same court held a

LOGGING COMPANY to be a RAILROAD within the purview of the fellow-servant act in *Schus v. Powers-Simpson Co.*, 85 Minn. 447, and a mining company to be a railroad in *Kline v. Minn. Iron Co.*, 93 Minn. 963. In these cases it is apparent that the court's construction of the term was controlled by the context and by the evil to be remedied.

In *Jennings v. Great Northern Railway Co.*, 96 Minn. 307, the court says:

> "The statute is held not to apply to street railways although INCLUDED WITHIN ITS GENERAL LANGUAGE for the reason that their employes are not exposed to the hazards and dangers incident to the operation of ordinary railroads."

In *Schus v. Power-Simpson Co.*, 85 Minn. 451, the court says on pp. 452, 453:

> "THE DEFENDANT WAS NOT ORGANIZED AS A RAILROAD CORPORATION it is true; but it is conceded that it is operating a line of railroad equipped with engines and cars, the operation of which, so far as concerns the running of its trains, is identical with ordinary railroads, except that it is in the interest of its own private affairs. Every purpose intended to be subserved by the statute applies to it. Its servants and employes in the operation of its trains are exposed to the same dangers and hazards, if not greater, as employes of ordinary railroads; and to hold that it does not come within the statute would, in our judgment, be illogical and out of harmony with the prior decisions of the court, against the manifest intention of the legislature, and a cramped and unnecessarily restricted interpretation of the law. The mere fact that it is

called a 'logging railroad,' AND CAME INTO EXISTENCE SINCE THE PASSAGE OF THAT ACT, IS BY NO MEANS decisive of the question.

"It is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. *McAunich v. Mississippi*, 20 Iowa, 338. And within this rule, even though defendant is engaged in operating a 'logging railroad' only, and exclusively in the interest of its private affairs, and though such railroads were not KNOWN AT THE TIME OF THE PASSAGE OF THE STATUTE, and CONSEQUENTLY NOT THEN IN THE CONTEMPLATION OF THE LEGISLATURE, the operation of its road, in respect to the dangers and hazards to which its employes are exposed, brings it squarely within the spirit and purpose of the law; and it must, to effectuate fully the intention of the legislature, be held to be within its scope and operation.

"In the case of *Mikkelson v. Truesdale*, *supra*, it was held that the statute applies to a receiver engaged in operating a line of railroad as the representative of the court, in the interests of bond-holders and creditors. We are unable to point out any logical distinction between a receiver engaged in operating a railroad and a lumber company similarly engaged, in so far as applicable to this statute. A like conclusion was reached in *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270.—a case involving a similar statute. In *Daniels v. Hart*, 118 Mass. 543, mortgagees in possession of railroad and operating it were held to be within the meaning of the statute. These decisions are in line with sound reasoning and the spirit and purpose of such statutes. It was held in *Funk v. St. Paul City Ry. Co.*, 61 Minn. 435, 63 N. W. 1099, that the statute did not apply to street railways. BUT THE REASONS FOR THE STATUTE DO

NOT IN ANY ESSENTIAL DEGREE APPLY TO SUCH RAILWAYS. EMPLOYES ON SUCH ROADS ARE NOT EXPOSED TO SUCH HAZARDS, RISKS, AND DANGERS AS ARE THE EMPLOYES OF RAILROAD CORPORATIONS PROPER.

"The spirit and purpose of the statute must be looked to in determining its scope and application; and as the spirit and purpose of this law was the protection of employes engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to employes the legislature intended to provide against."

The court calls attention to the fact that the word "railroad" in *Mikkelson v. Truesdale*, 63 Minn. 137, was held to mean a receiver of a railroad. In *Wall v. Platt*, 169 Mass. 368, a similar conclusion was reached. In *Daniels v. Hart*, 118 Mass. 543, the term "railroad" was held to mean "mortgagee in possession." As to the construction of the word "railroad" at page 450 (85 Minn.) the court said:

"Within the reasoning of that decision, and other cases in this court (*Smith v. St. Paul & D. R. Co.*, 44 Minn. 17, 46 N. W. 149; *Lavallee v. St. Paul M. & M. Ry. Co.*, 40 Minn. 249, 41 N. W. 974; *Mikkelson v. Truesdale*, 63 Minn. 137, 65 N. W. 260) the test in interpreting and construing this statute is not WHETHER THE CORPORATION ENGAGED IN OPERATING THE RAILROAD WAS ORGANIZED AS A RAILROAD CORPORATION, but whether the road being operated as a railroad, within the ordinary meaning of the term, in and about the operation of which employes

are exposed to those DANGERS AND RISKS AGAINST THE CONSEQUENCES of which the legislature INTENDED TO PROVIDE.

"In *Sutherland St. Const.*, 218, it is said to be indispensable to a correct understanding of a statute to inquire what is the subject of it, —what object is intended to be accomplished by it? When the subject matter is once clearly ascertained, and its general intent, a key is found to all its intricacies. General words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. The subject matter of the statute under consideration and its intent and purpose, were to protect employes engaged in a dangerous and hazardous employment; and within the decisions cited, THE CHARACTER OF EMPLOYER IS NOT OF CONTROLLING IMPORTANCE. The statute is to be given, if not a liberal, at least a reasonable interpretation, and one that will carry into effect the intent of the legislature. If the CHARACTER OF THE EMPLOYER, within the meaning of the statute, is not important, and the NATURE OF THE EMPLOYMENT is the test to be applied in construing the statute, the expression 'ANY RAILROAD CORPORATION engaged in the operation of a railroad" should, within the rule laid down by Sutherland be ENLARGED AND EXPANDED so as to include any person, company, or corporation engaged in OPERATING A RAILROAD, incident to which operation are the DANGERS AND HAZARDS from which the legislature INTENDED TO PROTECT THE EMPLOYES. *Winters v. City of Duluth*, 82 Minn. 127, 84 N. W. 788."

In *Kline v. Minnesota Iron Co.*, 93 Minn. 63, page 66 the court said:

> "This statute has been before the court in numerous cases and we have uniformly held that it was intended by the legislature to apply to RAILROAD HAZARDS and not to RAILROADS AS SUCH; that the CHARACTER OF THE EMPLOYMENT was the test to be applied in determining its validity and not the CHARACTER of the employer."

The *Funk* case is the foundation of all other decisions cited upon this proposition by counsel and if that is gone the other decisions fail as further authority.

The case of *State of Minnesota Ex. rel. St. Paul City Railway Company v. District Court*, 31 Minn. 354, could have been disposed of in a word if the words "railway company" did not include street railways such as the St. Paul City Railway Company. In disposing of this case instead of saying the term "railway" did not mean "street railway" it disposed of the case on the ground that the tracks were not real property, but were personal property, and consequently did not come within the language that "any REAL ESTATE belonging to such railway company and being benefited by said improvement, shall be assessed as in other cases."

In *City of Tower v. Tower & Soudan Street Ry. Co.*, 68 Minn. 500, our court held that the word "road" or "railroad" meant a "street railway." The syllabus in part reads:

"The City of Tower through its common council, granted to a street railway, its successors and assigns, the rights and privilege of constructing, maintaining, and operating a line of street railway on any and all of its streets and public highways for a period of twenty years, the cars on said railway to be propelled by horses, mules, steam, electric or other motor, for the purpose of transporting passengers and freight. The grant was made upon various conditions. The 12th section of the ordinance read as follows:

" 'This franchise is granted upon condition that the company faithfully fulfill the requirements herein expressed, and should the company fail therein, or wilfully abandon such *road*, and neglect or refuse to operate it, then this franchise to become null and void. Said company agree that they will forfeit said ROAD to the City of Tower in one year after said company cease to operate said road.'

"The (street) railway company became insolvent, and neglected and ceased to operate the road for more than one year. HELD, that the word ROAD, as used in said section of the ordinance, has the same import as if it read RAILROAD."

At page 504 the court further said:

"The word ROAD as used in section 12, includes the road-bed, with the ties, rails, and all that constitutes a completed superstructure on which cars transported passengers or property, or both. By reference to our statutes on the subject of railroads, it will be found that in numerous instances the word 'road' is used in the same sense and with the same meaning as 'railroad.' Of course whether the word 'road' is used as synonymous with, or equivalent of, RAILROAD depends upon its CONTEXT. In the section above quoted it has the same import as if it read 'railroad.' "

(The court was talking about the Tower & Soudan STREET Railway Company when it said "railroad.") This decision was written by the same judge who wrote the opinion in the *Funk case*. This shows that there was no intention to confine the word "railroad" exclusively and always to the "steam railroad of commerce." See *Newell v. Lyndale & Minnetonka Railway*, 35 Minn. 112, where a railway company organized for One Hundred Years (page 142 Supplemental Brief) was a street railway because it conducted itself as a street railway in not imposing any additional servitude on adjoining land-owners. In *Carli v. Stillwater, Etc. Railway*, 28 Minn. 373, we have apparently a street railway corporation which is held to be a railroad company and imposing additional servitude because it conducted itself as a railroad company. It is, therefore, manifest that it is not the CHARACTER OF THE CORPORATION but the ACTS IT PERFORMS which have been discussed by our Supreme Court in the decisions referred to by counsel for appellant to show that the word "railroad" never means or includes street railways or street railway companies.

There is no requirement that words should receive the same construction in different legislative acts or in different chapters of the statute. Our court so held in *State of Minnesota, ex rel, St. Paul City Railway Co. v. District Court of Ramsey County*, 31 Minn. 354. On page 358 the court says:

"Reference was made on behalf of the city to the general tax law for a definition of REAL PPROPERTY. General Statutes, 1878, chapter 11, section 2, enacts that 'real property for the purpose of taxation, shall be construed to include the *land itself*, * * * and all buildings, structures and improvements, trees or other fixtures of whatsoever kind thereon, and all rights and privileges thereto belonging or in anywise appertaining.' *This definition is of no value here*, for it is a *definition* 'for the purposes of *taxation*,' not ASSESSMENT FOR LOCAL IMPROVEMENTS, and this consideration disposes of *People v. Cassidy, supra*, a case much relied upon by the counsel for the city, which was a case in which the track of a railroad was, for purposes of TAXATION, held to be *real property*, under a statutory definition similar to our own."

Rupp v. Swinford, 40 Wis. 28.
State v. District Court, 54 Minn. 34.
Carli v. Railway Co., 28 Minn. 373.
Potter's Dwarris Stat. Constr., pp. 677, 678.
Cherokee Nation v. Georgia, 5 Pet. 1, p. 19.
Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438.

We have so far shown that the articles of incorporation of the appellee manifestly was in compliance with Title I and in violation of several provisions of Title II. We have shown that under the articles the appellee railway company was a public service corporation and as such was invested with the power of eminent domain. We have shown that the word "railway" is broad enough to include street railways. We have also shown that Title II covers private corporations and not public service corporations. We have shown that the word "transportation" in Re-

vised Laws of Minnesota 1905 could not mean "street railways." And we believe that we have further shown that the word "transportation" has retained the same meaning from the year 1868 when it was first introduced into Title II until it appears in chapter 58 Revised Laws 1905, and consequently did not mean "street railways" in 1873. We believe it is patent from a reading of Title II as it stood in 1873 that it covered purely private corporations as the supreme court said in *Brown v. Corbin,* 40 Minn. 510; that the manufacture of gas or the building of docks or warehouses or elevators did not include public service corporations, such corporations as could be compelled by mandamus to serve the public. They could cease to operate at any time they saw fit. We have, therefore, shown the impossibility of a public service corporation (which can be compelled by mandamus to perform its public functions) being incorporated under Title II. We have also shown that there must be some place where such corporations can be formed, and for these reasons we can see no escape from the conclusion that the appellee was incorporated under Title I for FIFTY years, and that it is still a continuing corporation at least until the year 1923. The argument presented by us so far was clearly summed up by the circuit court in disposing of this major contention of the appellant.

Judge Lochren, in his decision (Fol. 242, rcd.), clearly disposes of the contention that the appellee was not properly organized under Title I. He uses this language:

"Title I in its heading states it to refer to corporations authorized to exercise the power of eminent domain. Then it specifies 'railways, canals and slackwater navigation either in lakes or rivers,' and some other kinds perhaps, but all evidently public service corporations, *quasi* public corporations, corporations which under the laws it has been always understood MIGHT BE INVESTED WITH THE RIGHT TO EXERCISE THE POWER OF EMINENT DOMAIN FOR PUBLIC USE. As I said before, a street railway is a corporation of that character. It is a *quasi* public corporation. Its duties are to render public service. Now it is true that street railways by that name are not mentioned in Title I. Railways are mentioned as the very first kind of business that is named in the Title. It also includes any other public improvement, any association formed for the purpose of carrying on the work of public improvement, but it seems to me that the title of railways, without more, covers the case of street railways. In other words, that 'railways' is a generic title which covers all kinds of railways. A railway is a way which is made for the movement of cars or something of that character upon tracks that are laid down either on streets or somewhere else. They are not propelled as ordinary vehicles, such as wagons and carriages are on the highways generally, but require for their operation that tracks be expressely formed to be moved upon, and a street railway is of that character. Therefore, it is distinctly a railway. Now, there is nothing in that statute which would indicate that street railways were not included in it. They are railways. They perform public functions. It is PROPER TO INVEST THEM WITH THE POWER TO EXERCISE THE RIGHT AND POWER OF EMINENT DOMAIN. There is no reason in the world why they should be omitted."

THE APPELLEE IS ENGAGED IN A WORK OF INTERNAL IMPROVEMENT.

It performs a public function, and for that reason could well be authorized to exercise the power of eminent domain. In several decisions street railways have been specifically defined to be works of internal improvement. In *Attorney General v. Pingree*, 120 Mich. 550, the syllabus in part read:

> "Act No. 338, Local Acts 1899, purporting to empower a commission to be appointed by the common council of the city of Detroit to acquire for the city and maintain and operate in its behalf the system of street railways which lies partly within and partly without the corporate limits, and comprises over 140 miles of track, is void under Article 14, Section 9, of the Constitution prohibiting the state from being a party to or interested in any work of internal improvement, the operations contemplated by the act being of sufficient magnitude to constitute internal improvements and the legislature being powerless to authorize a municipality to do what the state could not itself do."

In *Attorney General v. Common Council City of Detroit*, 148 Mich. 75, the court held that a street railway is an internal improvement under Section 9 of Article 14 of the Constitution of Michigan, which provides that the state shall not be a party to nor interested in any work of internal improvement.

In *Northwestern Telephone Co. v. Milwaukee R. R.*, 76 Minn. 345, the court of this state held a telephone company to be a "*work of internal improve-*

ment," and as such authorized to condemn under Title I of Chapter 34. In *Minneapolis & St. Paul Suburban Ry. Co. v. Manitou Forest Syndicate,* 101 Minn. 132, the syllabus in part is as follows:

> "As determined by the main purport of its articles, such corporation is a work of internal improvement and a common carrier, and its articles having been executed in compliance with Title I, Ch. 34, General Statutes of 1894, was entitled to exercise the right of eminent domain conferred by Section 2592 (Sec. 1, Title I, Chapter 34, Revised Statutes of 1866) thereof, even though the incorporators declared in the articles that they proposed to incorporate under the provisions of Title II."

See p. 115, supplemental brief for articles of incorporation of the Minneapolis & St. Paul Suburban Ry. Co.

In *Cook v. Iverson,* (Minn., July 9, 1909) 122 N. W. 251, the court held that roads and bridges were works of INTERNAL IMPROVEMENT under the clause of our constitution prohibiting the State from being interested in or being a party to the carrying on of works of internal improvement. See also

22 Cyc., 1590.

Blair v. Cuming County, 111 U. S. 363.

State v. Frochlich, 115 Wis. 32.

Rippe v. Becker, 56 Minn. 100.

Clark & Marshall, Private Corporations, Vol. 4, p. 3073.

Clark & Marshall Private Corporations, Vol. 1, p. 90, Sec. 36-S.

In Chapter 74, General Laws of 1893, and Sec. 2841, R. L. 1905, we have a legislative declaration that street railways constitute works of internal improvement.

> "Any number of persons not less than five, may associate for incorporation and become incorporated under and according to this title for the construction, maintenance and operation of any work or works of internal improvement requiring the taking of private property, or any easement therein, for public use, INCLUDING railways (street railways), telegraph lines, canals, slack-water or other navigation upon any watercourse, bay or lake, dams to create or improve a water supply or power for public use, and any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power."

APPELLEE WAS MADE A CORPORATION TO ENDURE FOR FIFTY YEARS BY VIRTUE OF THE RATIFYING AND LEGALIZING ACT, CHAPTER 299 OF THE SPECIAL LAWS OF MINNESOTA, 1879.

That there remains any doubt that the company was incorporated under Title I instead of Title II, Chapter 34, seems incredible, yet if such doubt does exist it is clearly removed when we consider the ratifying act of 1879. The company attempted to incorporate for fifty years. It so specified in its articles of incorporation. After these articles had been filed and published so their contents were known, the city of Minneapolis granted

to the company rights and franchises to operate railways in the streets of the city during the term of its CHARTER. The word "charter" meant the "ARTICLES OF INCORPORATION."

In *Bergman v. Building Assn.*, 29 Minn. 278, the court says:

> "The foregoing matters are all found in defendant's articles of incorporation. THESE ARTICLES ARE ITS CHARTER, AND, SUBJECT TO THE CONSTITUTION AND GENERAL LAWS OF THE STATE, its fundamental and organic law."
>
> *Conynton on Corporate Management*, Sec. 18.
>
> *Thompson on Corporations*, Md. 2nd Ed., Secs. 172 and 370
>
> *Purdy's Beach Corp.*, Secs. 47 and 72.
>
> *Morawetz on Corporations*, Sec. 318.
>
> *Elliott on Railroads*, Sec. 34.
>
> *Cook on Corporations*, Sec. 2.
>
> *Louisville v. Citizens' Gas Co.*, 115 U. S. 683.
>
> *Joyce on Franchises*, Secs. 41, 42 and 45.

The articles of incorporation were undoubtedly examined by the common council of the City before July 9, 1875, when the ordinance was passed. By referring to the charter or articles of incorporation the common council thereby incorporated it in section 1 of the ordinance. As already stated it is immaterial whether properly filed under Title I or Title II of chapter 34. These articles stated, in section 2, that the CORPORATION WAS FOR FIFTY YEARS. The legalizing act of 1879 ratified that part of the articles of incorporation which

were thus incorporated in section 1 of the July 9, 1875, ordinance, and therefore FIXED the term of duration of the company.

In the *charter* or articles of incorporation the *term* of existence of the appellee was specified to be fifty years from and after the first day of July, 1873. That is the "term of the charter" meant in the ordinance of July 9, 1875. This legalizing act legalized the parties to the contract. Section 17 of the ordinance of July 9, 1875 (Fol. 14, rcd.) specifically provides that when the ordinance is accepted by the appellee it shall constitute a CONTRACT. When this contract was recognized and ratified by the legislature, as already stated, it created competent parties to the contract, and for the term of existence named in the company's charter, to-wit., for the term of FIFTY YEARS. Both the street railway and the City were corporations and their powers could be enlarged without violating any constitutional provision. *City of Duluth v. Duluth St. Ry.*, 60 Minn. 178. This proposition we believe is thoroughly established by the authorities. In *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296; 22 C. C. A. 334, at p. 351 of 22 C. C. A., the court says:

> "Whatever doubt may exist as to the sufficiency of the corporate powers of the Cincinnati Inclined Plane Ry. Co. prior to the act of 1877 to hold, maintain and operate a street railroad in connection with its inclined plane, or as to the power of the city of Cincinnati to consent to the occupancy of its streets, that defect in power was removed by the act of 1877," etc.

In *Nash v. Lowry,* 37 Minn. 261, the Supreme Court of this state, as shown by the syllabus, held:

> "The common council of St. Paul by ordinance granted in terms the right to lay street railway tracks in any or all the streets of the city (with certain exceptions). Subsequently the legislature confirmed and validated the ordinance held that it is immaterial to the validity of the grant whether the parties to whom the right was granted constituted a corporation or only a partnership. * * * Also that the grant is a contract, and while the council could not make such contract without the explicit consent of the legislature, it became binding upon the city as soon as the legislature confirmed and validated the ordinance, so that thereafter the council could not rescind or revoke the right so granted."

Morawetz on Private Corporations, at Sec. 20, reads:

> "The existence of a corporation formed without legislative authority may be legalized by the subsequent assent of the legislature. For this purpose it is not necessary that an act be passed investing the association with corporate franchises by express terms, but it is sufficient if the legislature by statute recognizes and thereby ratifies the franchises which have been claimed. Thus, a statute annexing other territory to the Town of 'A,' by implication makes it a town if it was not a town before. A statute amending the charter of a railroad company legalizes the subsequent existence of the company, though it had originally been formed in violation of the law."

At Sec. 319 the same author says:

> "Where the legislature by statute recognizes and acquiesces in the existence of a corporation which was formed by the corporators

without the proper authority, it thereby invests the association with the right of continuing to act in a corporate capacity for the purposes and in the manner that it publicly assumed to act, and if rights or franchises are conferred upon an association claiming to be incorporated, it thereby becomes authorized to exercise the powers expressly conferred and such others as the legislature appears to have imputed to it."

In *Detroit Citizens Street Ry. Co. v. City of Detroit*, 64 Fed. 646, the court says:

"We are thus led to conclude that these STREET RAILWAY ACTS directly confer upon the municipalities of the state power to grant to street railway companies such an easement of way in the streets as is requisite for the purposes to be accomplished."

Robertson v. Rockford, 21 Ill. 451.

Citizens' Water Power Co. v. Bridgeport Hydraulic Co., 55 Conn. 1.

State ex rel. St. Paul v. St. Paul, Minneapolis & Manitoba Railway Company, 98 Minn. 388.

Almand v. Atlanta Consolidated Street Railway Co., 108 Ga. 417.

Clark v. Janesville, 10 Wis. 130.

In re Application of Prospect Park, etc. Railway Co., 67 N. Y. 371.

Blair v. Chicago, 201 U. S. 455.

City Railway Co. v. Citizens' Street Railway Co., 166 U. S. 557.

Cooley Const. Limitations, (4th Ed.) p. 474.

C. & P. Tel. Co. v. Mayor &c. Battingore, 43 Atl. 780.

Vol. 1, *Clark & Marshall Corp.*, p. 117.

People v. Detroit, etc., Ry., 121 N. W. 815.

Abbott on Municipal Corporations, Vol. 1, Sec. 281, and cases cited.

Society for the Publication of the Gospel, etc. v. Town of Pawlet, 29 U. S. *page 480.

People v. Perrin, 56 Cal. 345.

Noyes on Incorporate Relations, 2nd Ed., Sec. 20.

McCauley v. R. R. Co., 83 Ill. 348.

R. R. Co. v. R. R. Co., 52 Conn. 276.

Des Moines City Ry. Co. v. City of Des Moines, 151 Fed. 854-7.

Koch v. Ry. Co., 15 L. R. A. 377.

Ry. Co. v. Ry. Co., 13 R. I. 275.

McCartney v. Ry. Co., 112 Ill. 612.

City of Virden v. Allen, 107 Ill. 505-6.

Joyce on Electric Law, Sec. 370.

Morawetz on Private Corporations, Secs. 20 and 319.

Clark & Marshall Private Corporations, Vol. 1, pp. 119 and 217.

Town of Endes v. Eli, 158 U. S. 312-22.

Campbell v. Kenosha, 5 Wall. 194.

Booth Street Railway Law, Sec. 14.

28 Cyc., 376, Paragraph 10.

6 *Am. & Eng. Ency. of Law*, 941, under heading "Curing Defects in Act of Municipal Corporations," and cases there cited.

Bohmer v. Hoffen, 50 N. Y. S. 857.

Baltimore & Pot. Ry. v. Reaney, 42 Md. 131.

O'Brien v. Maryland, 51 Md. 24.

State v. Miller, 66 Mo. 342.

City of Ashland v. Wheeler, 88 Wis. 614.

Boone v. Burlington, 139 U. S. 693.

State of Wis. v. Torrinus, 26 Minn. 1.
State v. Dreffus, 12 So. 841.
People v. Brooklyn &c., 89 N. Y. 75.
Brown v. Atlanta Ry. &c., 113 Ga. 462; 39 S. E. 71.

We have, thus-far, confined our discussion largely to the first point made in the City's brief, to the effect that the Company was organized under Title II of Chapter 34, Revised Statutes 1866, and we believe it has been shown that this claim on the part of the city is without merit.

The second claim made by the city is that the company was simply a horse street railroad and that the city was and is without power or authority from the State to contract as to change of motive power, and hence it is argued that the company is without any contract covering the present electric street railway, which prohibits the City Council from reducing the Company's fares.

The third claim of the city is that under the reservations contained in the ordinance of September 19, 1890, the city was authorized to reduce the company's rate of fare. The discussion of these two latter claims by the city cannot be readily separated, for a discussion of one must necessarily involve more or less of a discussion of the other point. We shall therefore, for the sake of clearness and convenience make the following points which we believe will cover everything raised by the city's brief on its last two propositions. We shall show that a contract was entered into, at least at the time of

the ratification of the ordinance of July 9th, 1875, by the legislative act of 1879, which is protected by the Federal Constitution. In so doing it is important to consider a few preliminary questions. It is important to know what the policy of the State of Minnesota is as to the inviolability of contracts and whether there is any constitutional or legislative provision as to modification or repeal of laws or ordinances constituting contracts. On page 90 of this brief we will show (1) THE POLICY OF THIS STATE AS TO THE INVIOLABILITY OF CONTRACTS. We shall next show (2) THE RULES OF CONSTRUCTION APPLICABLE. We shall show on page 100 of the brief that the ordinance is a contract by virtue of its acceptance and ratification and (3) because it is STIPULATED IN THE CONTRACT ITSELF THAT IT IS TO BE CONSTRUED AS A CONTRACT BETWEEN the city and the company. This having been done we shall discuss the claim made in subdivision 21, page 122 of the city's brief that the change of motive power was so important and vital that it destroyed our grant. This will be discussed under heading (4), CITY HAD POWER TO CONTRACT FOR CHANGE OF MOTIVE POWER. At page 121 we shall show that the ratification act of 1879 recognized the city's power to contract with reference to change of motive power. (5) THE CITY WAS THEREBY INVESTED WITH POWER AND AUTHORITY TO CONTRACT FOR A CHANGE OF MOTIVE POWER. On page 128 (6) we shall give authorities to the proposition that CHANGE OF POWER IS MERE REGULATION. As tending further to substantiate our claim that the

city had this power and authority to contract for a change of motive power we shall, at page 130 show (7) THAT THE CITY POSSESSES POWER AND AUTHORITY FROM OTHER LEGISLATIVE ENACTMENTS THAN ITS CHARTER. At pages 100 and 137 of the brief (8) we shall show that the ORIGINAL CONTRACT AS TO FARE IS STILL IN EXISTENCE, and has not been repealed; and, (lastly) on page 137 of the brief we shall show that RESERVATIONS IN THE ORDINANCE OF SEP. 19, 1890, DID NOT AUTHORIZE CHANGE OF FARE.

THE STATE OF MINNESOTA THROUGH AN UNBROKEN LINE OF DECISIONS HAS HELD THAT OBLIGATIONS OF CONTRACTS CANNOT BE DESTROYED WITH IMPUNITY.

In *Nash v. Lowry*, 37 Minn. 261, the court held:

> "That a grant (grant of the right to lay street railway tracks in streets of the city) is a contract, and while the council could not make such (exclusive) contract without the explicit consent of the legislatude, it became binding upon the city as soon as the legislature confirmed and validated the ordinance, so that thereafter the council could not rescind or revoke the right so granted."

State v. Young, 29 Minn. 474.

First Division of St. Paul & Pacific Ry. Co. v. Parcher, 14 Minn. 297-224.

Reed v. City of Anoka, 85 Minn. 294.

City of Duluth v. Duluth St. Ry. Co., 60 Minn. 181-284.

City of Duluth v. Duluth Telephone Co., 84 Minn. 486.

Northwestern Telephone Co. v. City of Minneapolis, 81 Minn. 140.
Roberts v. Washburn, 10 Minn. (Gil.) 8.
Abbott v. City of Duluth, 104 Fed. 833.
City of Duluth v. Abbott, 117 Fed. 137.
United States v. Minn. & N. W. R. R. Co., 1 Minn. (Gil.) 103).
State v. Ry., 21 Minn. 315.
County of Todd v. Ry., 38 Minn. 63.
Stearns v. Minnesota, 179 U. S. 223.
State v. Ry. Co., 30 Minn. 311.
State v. Ry., 32 Minn. 294.
County of Stevens v. Ry. Co., 36 Minn. 467.
County of Traverse v. Ry. Co., 73 Minn. 417.
State v. Luther, 56 Minn. 156.
Ry. v. Pfaender, 23 Minn. 217.
Duluth & Iron Range Ry. Co. v. St. Louis Co., 179 U. S. 302.

These authorities we believe will simplify this discussion by eliminating such cases as the *Freeport Water* case 180 U. S. 587, where the policy of the State was followed which differed from the policy of our State which is to sustain and keep inviolate contract rights. In this connection we call attention to *Omaha v. Omaha Water Company*, 147 Fed. 1, which contains a valuable analysis and criticism of the cases of this kind.

THERE WAS NO PROVISION IN THE CONSTITUTION OR LAWS OF THE STATE AUTHORIZING THE MODIFICATION OR REPEAL OF THE CHARTER OF THE APPELLEE.

There are many decisions which hold that if the power to modify and repeal is reserved then there can be no contract which is protected by the provisions of the Federal Constitution. Many cases of that kind were referred to by appellant at the trial in the Circuit Court. In this State there is no such provision either in the constitution or in the statutes. This will render inapplicable such cases. This is an important fact to be kept in mind throughout the consideration of this case. See *San Antonio Traction Co. v. Altgelt*, 200 U. S. 304.

THE RULE OF STRICT CONSTRUCTION APPLIES ONLY WHERE THE REASON FOR THE RULE EXISTS. IT DOES NOT APPLY TO RESERVATIONS WHICH DESTROY THE ORIGINAL GRANT, TO PROVISIONS IN FAVOR OF THE PUBLIC, OR TO THE LANGUAGE OF THE GRANTOR.

Counsel for appellant lay great stress upon the rule of strict construction applicable to public grants. Apparently they proceed upon the theory that this rule applies to EVERY PART OF THE INSTRUMENT CONTAINING A GRANT

FROM THE PUBLIC TO A CORPORATION irrespective whether the language is that of the GRANTEE or of the GRANTOR and irrespectipe whether the provision is IN FAVOR OF or AGAINST the public. Rules of construction like other rules of law apply only WHERE THERE IS REASON for the rules. If the REASON for the rule fails the RULE itself fails. The rule of strict construction, as said in the case of *Blair v. Chicago*, 201 U. S. 400-411, and in the case of *Cleveland Elec. Ry. Co. v. Cleveland*, 204 U. S. 116, applies where the grant is the language OF THE GRANTEE or where the grant takes something from the public. It would be folly to apply it to any part of a grant WHICH IS IN FAVOR OF THE PUBLIC because it would then be detrimental to instead of favorable to the public.

In *Detroit Citizens St. Ry. Co. v. City of Detroit*, 64 Fed. 640, the court held:

> "But the books abound in rules of construction. They all have one end in view, and that is to ascertain and declare the intent of the act under construction. Contrasting the rule which requires a strict construction of penal statutes with the rule requiring that the intent of the legislature shall govern, Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat. 95, as to the rule of the intent said:
>
> "'It is a modification of the ancient maxim, and amounts to this: That, though penal statutes are to be strictly construed, they are not to be construed so as to defeat the obvious intention of the legislature.'

In *United States v. Hartwell*, 6 Wall. 395, the court, in speaking of this rule of strict construction of certain classes of statutes, said of the rule that:

> "Whenever invoked, it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal as well as other statutes is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general, and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular, instead of the more narrow technical, one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.'"

Church of the Holy Trinity v. The United States, 143 U. S. 457-472:

> "It is a case where there was presented a definite evil, in view of which the legislature used general terms, with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

In *Kelly v. New York City Ry. Co.*, 53 Am. & Eng., R. R. Cases, (N. S.) 368, the syllabus in part is:

> "A railroad corporation, subject to the reserved power of the legislature to alter its character, has a right to exist under conditions as favorable as a sound state of policy, a due regard to the public interest, and a reasonable interpretation of the law will permit, and it should not be burdened by unnecessary implication of a legislative meaning beyond what those considerations demand; and when the legislature in unmistakable terms, and within constitutional limits, has exercised its power to regulate corporations, it should be given full effect, but no inferences unfavorable to reasonable operation of the franchise of a corporation should be allowed from words susceptible to use in more than one sense."

In *Abbott's Municipal Corporations*, vol. 3, p. 2022, author says:

> "Where it clearly appears * * * that certain powers and rights were given * * * no rule of construction should be adopted which will defeat or impair this grant; or so long as the effect of an act is not injurious to the public interest, that rule should be adopted which tends to facilitate the success of the corporate enterprise, rather than one which tends to defeat it."

In *N. W. Tel. Co. v. Minneapolis*, 81 Minn., on page 158, the court says:

> "THE PECULIAR NATURE OF THE TELEPHONE BUSINESS IS SUCH THAT THE PLAINTIFF AND DEFENDANT DO NOT STAND UPON EQUAL GROUNDS IN DEALING WITH EACH OTHER, AND, NOTWITHSTANDING THE PROVISIONS OF THE statute authorizing the use of the city streets, the exactions of the municipality might well be such that any hostile treatment of the plaintiff might greatly injure its business and deprive it of the benefits to be derived therefrom; and it is quite easy to see how the plaintiff MIGHT WELL DESIRE TO AVOID FRICTION WITH OR ANTAGONISM FROM THE CITY IN THE ENJOYMENT OF ITS FRANCHISES."

In *Romer v. St. Paul City Ry.*, 75 Minn. 217, the court said:

> "It is true that all public grants, unlike private ones, are construed strictly, and favorably for the grantor, the public. But it is equally true that where a grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary (not simply convenient) to effect the essential objects of the grant passed by necessary implication. Otherwise the purpose of the grant would be seriously impaired, if not wholly defeated."

Joyce on Electricity, Sec. 42, p. 93 says:

> "When the use contemplated includes as a means, new discoveries or inventions, if such use does not interfere with the purpose for which said streets * * * may rightfully be taken having in view the necessities of the time and the progress and conveniences of the age, then it is a lawful use."

In 9, Cyc. 590, as to construction of language by parties contained in contracts, the author says:

> "It is a well-settled rule of construction that words will be construed most strongly against the party who uses them; the reason for the rule being that a man is responsible for ambiguities in his own expressions AND HAS NO RIGHT TO INDUCE ANOTHER TO CONTRACT WITH HIM ON THE SUPPOSITION THAT HIS WORDS MEAN ONE THING, WHILE HE HOPES THE COURT WILL ADOPT A CONSTRUCTION BY WHICH THEY WOULD MEAN ANOTHER THING more to his advantage." Vol. 1, *Thompson on Corporations,* 2d Ed., Sec. 301, page 330, *Lusk v. Lewis,* 32 Miss. 227; *In re Coffee Co.,* 20, Ch. Div. 169.

In *Thompson on Corporations,* (2nd. Ed.), Sec. 326, page 362, the author says:

> "However the more liberal and certainly the better rule is that grants of this nature, containing a restriction or provision are to be construed so that the proviso will not defeat the grant, if possible. Especially when the purpose of the franchise is the performance of a public act, the grant is to be so interpreted as to enable the act to be done, and when the sovereign grants a public franchise over a highway or stream, a clause preventing the use or obstruction of the highway or stream will not be so construed as to defeat the grant. So, notwithstanding the

rule of strict construction in favor of the public a legal sense will sometimes be assigned to words in the construction of provisos in charters different from that which they ordinarily import, so as not to destroy the grant itself. These principles are illustrated in a class of older cases where charters provided that railroads crossing turnpikes or highways should not obstruct the same, and where grants were given to construct dams across navigable streams with the proviso that such dams should not obstruct or impede navigation."

In Vol. 3 *Thompson on Corporations*, sec. 2875, page 790, the author says:

"Though the rule is that nothing in these grants passes by implication, yet this is not to be understood as meaning that the words are to be given a forced and unnatural meaning; the common and accepted meaning of the words is to be followed. Thus, where a telephone company was granted the right to construct telegraph or telephone lines along the public highways of the state, in the absence of an acceptance limiting the operation of the grant, it was held that it would be presumed from the nature of the business and the preparation made therefor, that the acceptance and the privileges thereunder were as broad as the grant, and included the right to extend the service as required by public necessity. If the instrument is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. Provisos annexed to the franchises are not to be construed so as to defeat the purposes of the main grant. Clauses relating merely to the manner in which the franchise shall be exercised are to be construed rather to effect the purposes of the grant, particularly where this purpose is the performance of a public act."

In *City of Duluth v. Duluth St. Ry. Co.*, 60 Minn. 182, the court says on page 182:

> "If this proviso or saving clause means what defendant claims, it must be rejected as void, because repugnant with the enactment. It would fall within the principle stated by Lord Coke that 'When the enactment and its saving clause are repugnant,—as where a statute vests a manor in the king, saving the rights of all persons, or vests in him the manor of A., saving the rights of A.,—the saving clause is to be rejected, because otherwise the enactment would have been made in vain.' *Walsingham's* case, 2 Plowd. 565; *End. Interp. St.*, Sections 184, 185."

In *Lewis' Sutherland St. Con.*, Vol. 1, page 444, the author says:

> "It is a general rule, however, that an amended statute is construed, as regards any action had after the amendment was made, as if the statute had been originally enacted in the amended form. 'The effect of an amendment of a section of the law is not to sever it from its relations to other sections of the law, but to give it operation in its new form as if it had been so drawn originally, treating the whole act as a harmonious entirety, with its several sections and parts mutually acting upon each other. Where a proviso is added to a section by amendment it will be strictly construed and will be applied only to that section, unless a contrary intent is clear.'"

THE ORDINANCE OF JULY 9, 1875, AND ITS ACCEPTANCE AS PROVIDED BY THE ORDINANCE AND THE RATIFICATION BY THE LEGISLATURE BECAME A CONTRACT BETWEEN THE CITY OF MINNEAPOLIS, STATE OF MINNESOTA, AND THE COMPANY.

In this state, after the decision of the Supreme Court of the state in *Nash v. Lowry* above quoted, there can remain no doubt as to the creation of a contract by the acceptance and ratification of the ordinance of July 9, 1875, and that Section 8 of that ordinance became a contract on the subject of the rate of fare which the company was entitled to charge and collect from its patrons. All doubt on that subject is dispelled when we consider the stipulation in Section 17 of the ordinance of July 9, 1875 (Fol. 14, rcd.):

> "When so accepted this ordinance shall operate as a CONTRACT between the city and said company."
>
> *Los Angeles v. Low Water Power Co.*, 177 U. S. 558.

As to the effect of this stipulation see *Farmers' Loan & Trust Co. v. Mayor, etc., of Meridian*, 139 Fed. 673, where the court, at page 678, says:

> "It was expressly stipulated that the ordinance, when accepted, should be 'A CONTRACT BETWEEN THE CITY AND SAID GRANTEE, (the capitals are ours) and should be the measure of rights and liabilities of the city and said grantee, his associates, successors and assigns.'

"In 2 *Parsons on Contracts* (8th Ed.) 515, we find the following:

" 'The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications the want of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make EXPRESS PROVISION, the reason of the implication fails.' "

In *Baumgartner v. City of Mankato,* 60 Minn. 244, the court says:

"The ordinance also provides that the railway company 'shall repair any and all injury done to the streets, sidewalks, curbs or gutters by the construction or repairing of the tracks along the streets, and to protect and save harmless the city of Mankato against any and all claims for damages arising from or caused by the construction or management of the tracks or roads herein provided for.' The railway company accepted this ordinance with all its provisions and conditions, and EXPRESSLY MADE THE ORDINANCE A CONTRACT between the parties, and thereupon it constructed its track along the center line of Front street, in said city. * * * HELD, that the railway company having received the benefits and advantages of the corporate franchise from the city under the provisions of the ordinance, it was *its contract duty* so to lay and maintain its rails that carriages could easily and freely cross its track," etc.

In *City of Ashland v. Wheeler,* 88 Wis. 607, the 1st paragraph of the syllabus is:

> "Ordinances passed by a town board granted to a corporation a franchise to furnish water for an unincorporated village within the limits of the town. Afterwards the village became a city, and an ordinance thereof granted and confirmed to the corporation all the rights and franchises conferred by said town ordinances (which were incorporated in and made a part of the city ordinance) subject to certain modifications. The city ordinance also fixed the rates which the corporation might charge, and provided that, when accepted, it should constitute A CONTRACT BETWEEN THE CITY and the corporation. HELD, that if the town ordinances were invalid because enacted without authority, they became valid as a part of the city ordinance, which was authorized by its charter, and the latter ordinance, upon acceptance of its conditions, became a valid contract between the corporation and the city."

City of Duluth v. Duluth Street Ry. Co., 60 Minn. 178-181.

Detroit v. Detroit City St. Ry. Co., 184 U. S. 368.

Los Angeles v. Water Co., 177 U. S. 558.

City Ry. Co. v. Citizens R. R. Co., 166 U. S. 557.

We come logically next to a discussion of the subject of change in motive power. WE BELIEVE THE CITY OF MINNEAPOLIS HAD POWER TO CONTRACT AS TO CHANGE OF MOTIVE POWER FOR SEVERAL REASONS; *first,* the original ordinance of July 9, 1875, contemplated a change of motive power by contract between the city and the railway company and this was con-

firmed by Chap. 299, Sp. L. 1879; *second*, the ordinance of July 3, 1878, which provided for a change of motive power on one of the lines to animal, steam or other power, when ratified, as it was by said ratifying act of 1879, invested the city with power on the entire system to consent as to change of motive power. *Third*, the city had a right to consent to change of motive power under its police powers and because of general local municipal control over streets. *Fourth*, Chapter 74 of the General Laws of 1893 which provides that the city shall prescribe the CONDITIONS upon which the street railways shall be operated, ratifies what the city had done under the ordinance of September 19, 1890. This feature of the case is like that presented in *Citizens' Street Railway case*, 166 U. S. 557.

If what we have said so far in the brief is to the purpose we have established the proposition that the ordinance of July 9, 1875, is a contract. If it is a contract it is subject to the rules of contracts. Like contracts it can be modified by the mutual consent of the parties who made it. Unlike legislation it is not beyond the control of the parties. It therefore seems that the very fact that it is a contract authorizes the city and the company to contract with reference to the particulars thereof, to modify, change or abrogate it if they see fit by mutual consent. If that be true that necessarily implies the right of the city and the company to contract with reference to change of motive power.

Any other construction than that would make it impossible to modify any of the terms of the contract. Unless the parties can by mutual consent modify this contract, then the transfer ordinances are entirely void.

If void, *Morrill v. Minneapolis Street Railway,* 103 Minn. 362, holding the street car company liable for failure to issue transfers was erroneously decided.

Counsel for the city start their second subdivision or heading of their brief (page 122) with a reassertion of the statement that the company is simply a horse railway and that it possessed no franchise except as a horse railway and that it had no contract with the city as an electric railroad for the reason as stated at page 150 of the brief that the City of Minneapolis lacked power to enter into any contract to change the motive power. If it lacked the power of entering into the contract then the ordinance of Sept. 19th, 1890, would be a nullity, and consequently could not destroy an existing contract. Counsel must take either one of two positions, that it is a nullity and did not affect the original contract, or that it is a contract and therefore, and because it is a contract, it modified the prior contract of July 9, 1875. The claim that the company is simply a horse railway we think has been disposed of by what has been said with reference to the primary franchise to be a corporation (see page 31 of our brief). There was nothing in the ordinance of July 9, 1875, which could destroy the character of the corporation. Besides the ordi-

nance of July 9, 1875 provides for a PASSENGER RAILWAY LINE, not simply a horse railway (fol. 6, rcd.).

It is contended by the city that the change of motive power by which the cars of the appellee were being propelled was of such a radical nature that *ipso facto* a new contract or a new license resulted from the passage and acceptance of the ordinance of September 19, 1890. The grant by the city of Minneapolis under the ordinance of July 9, 1875, Section 1, was to construct and maintain a *passenger railway* line in such streets as the city council deem suitable to street railways. The charter or articles of incorporation of the company provides (Fol. 59, rcd.):

> "The general nature of its business is to construct and OPERATE RAILWAYS in the streets and highways of the city of Minneapolis and its suburbs."

The articles of incorporation contain no limitation upon the authority of the company to use electricity as a motive power, but it is contended that the ordinance of July 9, 1875, by Section 4, thereof, contains such limitation (Fol. 8, rcd.). This section provides:

> "The cars to be used upon such tracks shall be propelled with either animal or pneumatic power, as the said company deem advisable, provided that, no propelling power or machinery of any sort shall be used after it shall prove to be a public nuisance, and said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the city council; but no locomotive, freight or passenger car, such

as are usually run over the general railways of this state for the transportation of freight and passengers, shall be used upon any of said tracks UNLESS AUTHORIZED BY THE CITY COUNCIL."

The contention of the city in regard to motive power was thus disposed of by Judge Lochren in his opinion (Fol. 249, rcd.):

"It is claimed also on the part of the defendant that this was only a company authorized to establish and operate a street car run by the motive power which is mentioned in that contract, either animal or pneumatic power, and that when it ceased to use that power it ceased to be the same corporation; that it gave up its corporate rights, or its contract rights under that ordinance by ceasing to use that particular kind of power. My conclusion is different from my reading of the contract. There is no doubt that at the time this contract was entered into and this ordinance was passed and accepted by the street car company it was understood that the street car service to be established under it would be one in which the cars would be propelled by animal power. It was provided it should be either by animal or pneumatic power. I think the statement of Judge Koon is true that pneumatic power was something that was somewhat fanciful at the time; that it had not been tried for such purpose. I never knew of its being tried for a purpose of that kind. I do not understand how such a power could be made applicable to the propulsion of a street car. Pneumatic power is something that is done by compressed air; but how it can be compressed and applied to such a use I do not understand. Still this contract does seem to contemplate that such power may be used. It does contain provisions which show it was contemplated, and also that it might change the kind of power to be used, for it says:

"'No propelling power or machinery of any sort should be used after it should prove to be a public nuisance.'

"This provision follows immediately after the words that provide for the use of such power. Then it provides also that the street car company should connect with other street car companies, but they shall permit no locomotive, freight or passenger car, such as are usually run over the general railways of the state for the transportation of freight and passengers to be used unless authorized by the city council. It contemplates that even those may be used if authorized by the city council, 'and that the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under section 3 of this ordinance shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon' between the parties. There is some provision that they shall only allow cars of other tracks to come on their railway track that are propelled by such power as the council,—

Judge Koon: It is the earlier part of Section 4, Judge. 'Said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council.' It is just above where you commenced to read.

The Court: 'That is it. It does not confine them to cars that are run by animal and locomotion power but to such as may be authorized to be used on street railways by the City Council. It contemplates that the City Council may authorize different kinds of power to be used.'"

Section 3 of the original ordinance (fol. 7 rcd.) provides for the extension and building of new

lines, and if the company fails within a reasonable time to build such extensions:

> "Then the City Council may charter to any other company the exclusive right to construct and operate a street railway in the street or streets so designated."

The City Council (at least since the passage of Ch. 74, G. L. 1893) could authorize such street railway to operate with electricity. The city has the right to forfeit any existing neglected line.

> "And the City Council may grant the exclusive right to any other person or company to build and operate a street railroad upon such neglected line" (fol. 8, rcd.).

This line also could be authorized by the City Council to operate by means of electricity.

By section 4 of the original ordinance (fol. 8, rcd.) it is provided:

> "Said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the City Council."

The City Council could authorize street railways under section 3 of the ordinance to be operated by electricity and under this provision the company was authorized to connect with and make contracts with other railways if using the same power that the City Council had authorized it and other street railways to use. An illustration in point is the grant to the Lyndale & Minnetonka Railway Company (see *Newell v. Railway*, 35 Minn. 112).

Sec. 4 also provides:

> "That the said Minneapolis Street Railway Company, and any other street railway company which the Council may charter under section 3 of this ordinance, shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by the said companies, or as may be determined by the District Court of Hennepin County."

As just stated there is nothing to hinder the City Council from granting to street railways under section 3 of the original ordinance the right to operate their cars by means of electricity. Section 4 specifically authorizes the company to contract with companies having such power as the City Council shall have authorized street railways to use. It also provides for the "joint use" of the street railway tracks of the appellee by any other company authorized to be constructed under section 3. If there is to be a joint use with a company operating cars by means of electricity it would be necessary for the appellee to equip its line for use by electric power in order to have a "joint use" of its tracks with the companies authorized under section 3 of the ordinance.

Sec. 4 further provided that "No propelling power or machinery of ANY SORT shall be used after it shall prove to be a public nuisance." The Council naturally would have said, "Pneumatic power shall not be used after it proves to be a nuisance," for the Council undoubtedly knew what animal and horse-power meant, and it knew whether or not

that would be a nuisance. Counsel say *pneumatic* power could be eliminated as fanciful—hence the council could declare horse power a *nuisance*. If it did what then? Was that the end? If so, there is here a proviso which defeats the grant. The court will avoid such construction. It will say instead another motive power which is not a nuisance can be agreed upon. The words "no propelling power *of any sort*" are inconsistent with the idea of limitation to horse power only. "No *propelling power or machinery*" is also inconsistent with a limitation to horse power only—no machinery is connected with horse power that may become a nuisance. "*No propelling power*" shows that horse power was not the only power under consideration. The council would have named the power if there was but one. This provision evidently indicates that the Council would have the right to contract as to different kinds of power, the limitation upon the power of the Council being that motive power should not be used after it became a nuisance. This is further evidenced by the fact that the section provides that no locomotive, freight or passenger cars, such as are usually run over the general railways of this State for the transportation of freight and passengers shall be used upon any of said tracks, UNLESS AUTHORIZED by the city council." Section 3 of the original ordinance puts no limitation upon the power of the other company which is to contract with the Minneapolis Street Railway Company. This section provides that the Minneapolis Street Rail-

way Company and any other street railway company which the council may charter under Section 3 shall allow the other to connect with and jointly use such portion of the track as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon by said company or may be determined upon by the District Court of Hennepin County. This is a strong suggestion that the new companies operating under Section 3 and the Minneapolis Street Railway Company may contract with each other as to motive power or the District Court could provide as to the power to be used. In paragraph 2 of Section 16 of the ordinance it is provided: "While cars are turning corners or crossing bridges, horses and mules attached thereto shall not be driven faster than a walk, and if OTHER POWER be used, not faster than three miles an hour." If pneumatic power is eliminated as counsel say, this provision becomes meaningless as there is no "other power." If the common council intended to limit the company to pneumatic power for all time to come, and if it intended to exclude the idea that this company could not agree with the council as to power, instead of using the terms "if other motive power be used," it would have said "if pneumatic power be used" then the speed shall not be greater than three miles per hour (see Folio 13, red.). And this construction has been borne out by the acts of the parties, as will appear from the numerous ordinances relative to motive power. As said by Judge Lochren in

his decision, at the time that the legislature, by Chapter 299 of the Special Laws of 1879, ratified the ordinance of July 9, 1875, there were at least two lines of steam motor railway operated upon the streets of the city of Minneapolis, one under the ordinance of 1878 specifically referred to and ratified by that act, the other the motor line operated by the Minneapolis, Lyndale & Minnetonka Railway Company on First Avenue which was held not to be a nuisance by the decision in *Newell v. Minneapolis, Lyndale & Minnetonka Railway Co.*, 35 Minn. 122. The court says:

> "But it seems that by an ordinance of July 9th, 1875, a corporation denominated the Minneapolis Street Railway Company was granted the exclusive right, subject to conditions not here important, of constructing and operating street railways in the city of Minneapolis, in such streets as the city council may deem suited to that purpose; and by ordinances of July 3 and 8, 1878, said 'company, its successors and assigns,' were authorized, upon similar conditions as above, to construct and maintain a street railway line on First Avenue South, and other streets, (being the route of defendant's railway); and 'to operate such line of railway with animal, steam, or other power,' the right to prohibit the use of steam when the public good required being reserved. On October 24, 1878, the Minneapolis Street Railway Company and the defendant, pursuant to authority given by their respective boards of directors, formally entered into a written contract, whereby, among other things, and for a sufficient consideration, the street railway company leased to the latter, for 43 years, its right and franchises to the use, for suburban railway purposes, of First avenue south and said other streets, and the lease

was duly recorded, November 17, 1878. Immediately upon the execution of this contract defendant entered upon First avenue south and the other streets mentioned, and, at large expense, constructed thereon its railway, which it has ever since maintained and operated, no other railway having been constructed on that route."

CITY MAY AGREE AS TO MOTIVE POWER UNDER THE EXERCISE OF ITS POLICE POWER.

It seems patent that the provision with reference to motive power is not an essential or vital part of the franchise. It is a matter of regulation that may be authorized or required as a matter of the police power. Certainly if regulation of fare belongs under the police power, as claimed by the city, there is no escape from the conclusion that motive power is also within the police power of the city.

3 *Abbott Municipal Court*, p. 2031, note 805.

As to the power to contract under the police power of the city our court, in *N. W. Tel. Co. v. City of Minneapolis*, 81 Minn. 162, says:

"We held in the former opinion, and now hold, that the only contract entered into by the city with the defendant was with reference to the manner AND METHOD OF PLACING ITS POLES AND WIRES. Such contract WAS WITHIN THE POLICE POWER OF THE CITY, and, the defendant having acted upon the contract by the ordinance of 1883 as to how it should place its poles and wires, the city cannot, without reasonable cause, in the

exercise of its power of regulation revoke its contract as to such matters, and order a different arrangement."

Pikes Peak Power Co. v. Colorado Springs, 105 Fed. 1-10.

Ry. Co. v. Town of Lakeview, 105 Ill. 207.

Street railways operated by electricity are not an additional servitude. This is the strongest proof that there is no fundamental or material change in the character of the street railway simply by change of motive power from animal to electricity. If that had constituted a fundamental change, the courts would naturally have held that the operation of an electric street railway would be an additional burden upon the adjoining property. That change of motive power from animal to electricity is simply a matter of regulation and not a fundamental change is held by *Louisville Trust Co. v. City of Cincinnati*, 73 Fed. 733; In *re Third Ave. Ry. Co.*, 121 N. Y. 536, and *People v. Brooklyn Height Ry.*, 187 N. Y. 48.

In 1875 the city of Minneapolis was a growing city of thirty thousand inhabitants. It was certainly contemplated between the parties to this litigation that the city would increase in size. It must also have been contemplated that new inventions applicable to street railways would be forthcoming and that different plans and schemes for handling passengers in a large city might be devised, so that the very fact that a contract was entered into between the city and the street railway company to run for fifty years is of itself the most conclusive

proof that it was the intent of that contract (ordinance of July 9, 1875) that it could be modified by mutual consent as to any feature covered by it, to meet changed conditions, especially as to any feature covering the change or alteration in the motive power by which the cars should be propelled. Presumably these parties did not intend to preclude the use of improved means of transportation, if some power more cleanly, healthy or efficient than animal power should be made available by inventive genius. Neither the legislature nor the council intended to preclude the city from acquiring and obtaining the benefit of all improved means of transportation. It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present and exclude all considerations for the developments of the future. If any presumption is to be indulged in, it is that general legislative enactments are mindful of the growth and increasing needs of society and that they should be construed to encourage rather than to embarass the inventive and progressive tendency of the people.

The change of motive power from animal to electricity was of great benefit to the community and city as well as to the street railway company. No possible detriment could or did result from this change of motive power. The rule of strict construction is, therefore, not within the reason and hence has no application to change of motive power. The rule announced by our Supreme Court in *Ro-*

mer v. St. Paul City Railway Co., 75 Minn. 217, should apply:

> "We find in these ordinances no express grant to the defendant to maintain the curves and switches in the avenues in question for the purpose of taking its cars in and out of its barn, but the right to do so was given by necessary implication.
>
> "It is true that all public grants, unlike private ones, are construed *strictly*, and *favorably* for the *grantor*, the public. But it is equally true that where a grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary (not simply convenient) to effect the essential objects of the grant passes by necessary implication. Otherwise the purpose of the grant would be seriously impaired, if not wholly defeated."

Abbott, in his work on *Municipal Corporations*, Vol. 3, page 2022, says as to the construction of grants of this kind:

> "It may be said, however, in this connection, that where it clearly appears from the language of the grant that certain powers and rights were given to be exercised, that no rule of construction should be adopted which will defeat or impair this grant, or so long as the effect of an act is not injurious to the public interests that rule should be adopted which tends to facilitate the success of th corporate enterprise rather than one which tends to defeat it" (citing many authorities in point).

Or as said by *Abbott in his work on Municipal Corporations*, Vol. 3, page 2024:

> "Both steam and street railways are enterprises of the greatest advantage and benefit

to a community, and without them it could not exist. A community is almost entirely dependent for its commercial growth upon the means of transportation afforded it. This, as well as other considerations, induce the courts to adopt the rule of liberal construction in many instances given above. The prosperity of a community is dependent largely upon the cheapness and facility with which its products and manufactures can be handled and the occupation of highways and streets by steam roads for their tracks, switches and terminal facilities, is almost the sole means of accomplishing this result."

Within all sense and authority the rule of liberal construction should be applied so as to authorize the street railways to adopt new kinds of power to enable the street railway companies to carry out to the fullest extent any benefit they may confer upon the public. See *Nellis Street Surface Railroads*, p. 199. *U. S. v. Ry.*, 150 U. S. 1. 3 *Thompson Corp.*, Sec. 2875; 1 *Thompson Corp.*, Sec. 309.

In *Lonergan v. Ry.*, (Ind.) 3 Am. Elec. Cases, 273, the court said, at page 282:

"The act was passed at a time when it was a matter of COMMON KNOWLEDGE THAT MECHANICAL DEVICES WERE BEING DAILY DISCOVERED, AND WERE PRACTICALLY APPLIED IN ALMOST EVERY DEPARTMENT OF PUBLIC AND PRIVATE ECONOMIES. THE LEGISLATURE WAS COGNIZANT THAT SCIENCE AND SKILL WERE OCCUPYING WIDER AND DEEPER FIELDS OF THOUGHT AND ACTIVITIES, AND NEW DISCOVERIES WERE USED WHEREVER AND WHENEVER TIME, MONEY, HEALTH AND THE CONVENIENCE OF THE PEOPLE REQUIRED THEM. It would seem, in such a case, to be an inversion of the true intent and under-

> standing of the legislature, to say that all the useful invented appliances of the future should be excluded from public enjoyment, and that the horse or other animal should alone be utilized to propel street cars. The statutes speak of a street railroad in the enacting clause, and in the body of the acts, as street or horse railroads, and this language is sufficiently broad to cover a street railroad, whether the cars are drawn by a horse or propelled by the power of an electric dynamo, and the defendant company is in the legitimate exercise of its charter power in using the same."

In 10 *Am. & Eng. Ency. of Law,* p. 881, the author says:

> "In many of the cases heretofore cited the city charter or other legislative act antedated the adaptation of electricity to use as a motive power. This does not affect the right of the railway company to adopt this new motive power. It is not irrevocably bound by the choice first made, and with the consent of the city it may at any time change."

See 3 *Thompson on Corporations,* 2nd ed., p. 801, Sec. 2882, and cases cited in note 136.

Municipalities in this state are invested with considerable power of local improvement and local self-control. This is established by the Supreme Court of this state in *Cook v. Iverson,* 122 N. W. 251, where the court says, at page 254:

> "The sense of the need and the wisdom of LOCAL SELF-GOVERNMENT WAS STRONG AT THE TIME the Constitution was framed, and it is quite clear from the provisions of the Constitution and the statutes to which we have referred that it was the purpose to continue the town and county system of public highways. It was expressly decided by this court in *David-*

son v. Ramsey Co. Com'rs., 18 Minn. 483, that the prohibition of Sec. 5, Art. 9, of the Constitution did not include towns and counties, and in doing so said:

> "'It is sufficient to say that the prohibition is, in terms, expressly confined to the state, and does not extend to cities, counties and towns. * * * There are obvious reasons why the people might see fit to deny to the state at large authority in this respect which they would not withhold from counties, cities, and towns. This would be but one more illustration of the familiar fact that the people have a great deal more confidence in themselves, as personal managers of public affairs near at home, than in the delegated management of the same by their representatives at a distance.'"

The doctrine of local self-government similar to the doctrine applicable in Michigan therefore prevails in this state. For that reason the decision of the Court of Appeals in *Detroit Citizens St. Ry. Co. v. City of Detroit*, 64 Fed. 628, on this subject seems conclusive. The syllabus in part reads:

> "The use of city streets for street railway purposes being, under the law of Michigan, a legitimate use, the general powers vested in the city of Detroit by its charter to open, close, and widen streets, and to prescribe, control, and regulate the manner in which the streets shall be used and enjoyed, are broad enough to permit the city to consent to the use of its streets for such purposes by any company having the requisite franchises of a street railway company."

If it may consent to the use of its streets for street railway purposes, may it not also consent to a change for a better motive power in such case?

This decision was approved by the Supreme Court in *Detroit v. Detroit Citizens St. Ry. Co.,* 184 U. S. 368.

IF THERE WAS ANY DOUBT AS TO THE POWER OF THE CITY IN 1890 TO CONTRACT FOR A CHANGE OF MOTIVE POWER THE CITY HAS BEEN GIVEN THAT AUTHORITY UNDER THE TERM *"CONDITIONS"* IN CHAPTER 74 OF THE GENERAL LAWS OF 1893, AND THIS WILL BE CONSTRUED AS A RATIFICATION OF WHAT THE CITY HAD DONE SHORTLY PRIOR THERETO. SAID CHAPTER 74 READS:

> "Provided, that the state of Minnesota shall at all times have full power and authority to supervise and regulate the business methods and management of any corporation existing and operating hereunder, and shall also have full power and authority at ALL TIMES TO FIX THE COMPENSATION WHICH SHALL OR MAY BE CHARGED OR RECEIVED BY ANY CORPORATION EXISTING AND OPERATING HEREUNDER. And any corporation organized under this act shall be subject TO ANY CONDITIONS from time to time imposed by such village or city through its board of trustees or city council."
>
> *Chicago General Ry. v. Chicago,* 52 N. E. (Ill.) 880.

Elliott in his work on railroads, 2d ed., vol. 3, at page 72, says:

> "The authorities cited below will serve to show the comprehensive power to impose CONDITIONS where the consent of the municipality is required, and, in a very recent decision, it is held by the Supreme Court of the United States that the authority given to the city to fix TERMS AND CONDITIONS includes the

power to determine and fix the terms of the occupancy of its streets by the company" (Citing a long list of authorities).

This law was passed less than three years after the ordinance was passed and while the change in motive power was being made.

A claim of want of power to authorize the change in motive power was made in *City Ry Co. v. Citizens R. R. Co.,* 166 U. S., and at page 569 of the decision the court disposes of it as follows:

> "Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority so to do, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

THE RATIFYING ACT OF 1879 GAVE CITY POWER TO CONTRACT AS TO MOTIVE POWER.

The ratifying act of 1879 gave authority and power to the city to contract with reference to motive power to be used upon the street railway. The charter of the company and the ordinance of July 9, 1875, contemplates A SINGLE system of railways. It did not contemplate separate lines of railway, but

ONE UNITED SYSTEM. When the legislature ratified the ordinance of July 3, 1878, conferring the power upon the company to operate a line of railway with animal, steam or other power (Fol. 15, rcd.) it recognized, yes INVESTED the city with power and authority to deal with the company as to motive power. It was not necessary that it should ratify the change of motive power on each and every line. It recognized the existence of the power in the city to contract on the subject of motive power. That authority would continue in the city as to all other future lines on the ONE SYSTEM.

In *Citizens Water Co. of Bridgeport v. Bridgeport Hydraulic Co.*, 55 Conn. 1, the syllabus in part reads:

> "If the common council had no power to grant the exclusive use of the streets, yet, as the charter of the defendant company recognized and confirmed the grant by the city, it became as effective as if the city had had the power to make it and as if the legislature had made it in the most direct and explicit words."

In *State ex rel. St. Paul v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 98 Minn. 388, the court says:

> "The obligation was enforced by the city of Minneapolis in the case of the *State v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 219, without special statutory authority, the obligation existing, as it is contended it does in the case at bar, BY FORCE OF THE PROVISIONS OF THE CHARTER OF THE RAILROAD COMPANY."

In *Almand v. Atlanta Consolidated Street Ry. Co.*, 108 Georgia, 417, the court says:

"When a street railway company has power under its charter to lay its track along the streets of a city, the city authorities may consent to such use of the streets by the street railway company, although there may be no express power in the charter of the city authorizing it to grant such a privilege."

In *Clark v. Janesville*, 10 Wis. 130, the court says:

"I concede that the provisions of the company charter do not authorize it to receive subscriptions of this kind. But the power is clearly given by the charter of Janesville. It is a well settled principle, that a grant of power carries with it, as incidental, everything necessary to its execution. Can it make any difference whether the thing necessary, implies an additional capacity in the one executing the grant, or in the one with whom, or the subject upon which it is to be executed? I think not. It is a question simply as to the intent of the legislature. They grant the city power to subscribe for the stock of the company, and give its bonds in payment. Did they intend that the company should have power to receive the subscription and issue the stock for the bonds? No one would seriously assert the contrary. Have they then employed the necessary language to show this intent? I think so, clearly, in the granting the power to the city to give the bonds for the stock. This carries with it, by irresistible implication, the power to the company to give the stock for the bonds, and it would have been an idle repetition to have said it should have the power.

Suppose a law authorize the issue of bonds by the state and providing that the governor might negotiate them by endorsement; would it be necessary to say that they should be negotiable? Suppose a license is required for marriage. If a license says A may intermarry

with B, is it also necessary to say that B may intermarry with A? When these shall be held necessary, then I shall think, that under a law authorizing a city to subscribe for the stock of a railroad company and deliver its bonds in payment, the company has no authority to receive the subscription or the bonds, but not till then."

In the *Matter of the Application of Prospect Park & Coney Island R. R. to Acquire Title to Lands, etc.*, 67 N. Y. 371, the syllabus in part reads:

"Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute."

In *Blair v. City of Chicago*, 201 U. S. 455, the court says:

"It thereby recognized the power of the common council to pass that ordinance. * * * The legislature by thereby confirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the common council to pass that ordinance under Clause 9, Sec. 4, of Chapter 4, of the Charter of 1851. In the act of 1859 the legislature did not assume to fix independently the term for the use of the streets but affirmed that which the common council had authorized the corporators to do and gave authority to confer future rights by agreement with the corporations. * * *If this ordinance had been without legislative authority previous to the act of February 14, 1859, that act constituted the persons named in the ordinance of 1858 with one other and their successors a body politic and corporate under the name of Chicago City Railway Company, for the term of twenty-five

years, with all the powers incident to such corporation."

In *Robertson v. City of Rockford,* 21 Ill. 451, the syllabus in part is:

"Municipal corporations are at the control of the legislature, and their charters may be enlarged or diminished, by an act incorporating a railway company."

On page 458 the court says:

"This, as are all such municipal corporations, is dependent upon the legislative will for their existence as well as all power exercised by them, and their corporate powers may be increased or contracted by the legislature, at will. And the enlargement of this power may be given, by an act not professing, in terms, to amend their charter, but may be as effectually done, IN AN ACT INCORPORATING A RAILROAD COMPANY. This provision contained in the railroad charter is the last expressed will of the legislature, and must be held to be binding."

In *City Ry. Co. v. Citizens St. Ry. Co.,* 166 U. S. 557, 569, the court says:

"Conceding, although not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity in the absence of legislative authority so to do, we think the act of 1891 should be construed not only as conferring a new authority upon the city but as a ratification of what the city had already done in that direction."

See also 3 *Abbott, Municipal Corporations,* page 2023 and note 786, pp. 2030, 2031.

3 Abbott's Municipal Corporations, p. 2023, and cases there cited.

28 Cyc. 728, note 59.
Denver &c. Ry. v. Mayor, 5 A. & E. Elec. Cas. 8-13.
Sevis v. City Newton, 75 Fed. 886.

THE RULE OF LIBERAL CONSTRUCTION SHOULD BE APPLICABLE TO THE GRANT OF AUTHORITY TO USE ELECTRICITY AS A MOTIVE POWER.

In *Thompson on Corporations*, Vol. 1, 2d Ed., Section 309, the author says:

> "It is not to be assumed from rules already given that the interpretation of a charter is to be so strict, or so much in favor of the public and against the incorporators, as to be unreasonable. On the contrary, the doctrine established by numerous cases is that the construction is to be reasonable. Ordinarily the interpretation is not to be opposed to the general purposes of the grant, except where the restrictive language of the charter itself is such that it cannot be overlooked or disregarded. On this theory of interpretation statutes and charters are permitted to include devices, instrumentalities and methods of conducting business, unknown and not in use at the time of the adoption of such charter. This rule of progressive construction permits corporations to keep pace with the progress made in inventions and appliances, and extends charters to protect appliances and methods of transacting business which were not known and could not have been stated in the charter at the time it was granted."

GENERAL AUTHORITY OVER STREETS AUTHORIZES CITY TO CONTRACT AS TO MOTIVE POWER.

The decisions of this state, such as *Nash v. Lowry,* 37 Minn. 261, and *Long v. Duluth,* 49 Minn. 280, recognize the right of the municipality to make contracts, but hold that general authority to control streets does not authorize the granting of an exclusive franchise. This does not mean that the City is without power to contract as to motive power. As already suggested, the motive power to be used by the street railway is simply a matter of regulation which the City can contract with reference to, even under the police power vested in the City.

At page 125 of the brief counsel says:

> "The old horse Street Railway was abandoned in about the year 1890 and had become wholly inadequate and practically obsolete."

This new motive power was discovered just prior to 1889. Cable lines also were built. A fever for this new motive power spread all over, even to the City of Minneapolis. The motor lines operated by steam were adequate as far as handling people were concerned. They were objectionable, not because of their *inadequacy*, but because of the smoke and noise attending their operation, and it was because of the discovery of the new power that the City demanded the change of motive power in 1889 and 1890.

CHANGE OF MOTIVE POWER IS MERE REGULATION AND NOT THE CREATION OF A NEW FRANCHISE OR GRANT.

In *People v. Brooklyn Heights Railroad Co.*, 187 N. Y. 48, the court says:

> "The fact that the lessee subsequently dispensed with steam as a motive power and substituted electricity on the leased lines does not affect the situation or change its rights so far as the question of fares is concerned."
>
> "Whether the elevated and steam surface railroads within the city should be placed upon the same basis with street surface railroads with reference to fares and the transfer of passengers is a question for the determination of the legislature and not for the courts."

See opinion by court.

In *re Third Avenue Railroad*, 121 N. Y. 536, the court says:

> "The provision of the act of 1889, in reference to street surface railroads (Sec. 12, chap. 531, Laws of 1889), authorizing such a road, upon obtaining the approval of the state board of railroad commissioners and the consent of the property owners as specified, to operate its road 'by any power other than locomotive steam power instead of by animal or horse power,' CONFERS NO SUBSTANTIAL FRANCHISE TO CONDUCT OR OPERATE THE ROAD, BUT IS SIMPLY A REGULATING ACT."

In *Louisville Trust Co. v. City of Cincinnati*, 73 Fed. 733, the court says:

> "A consent to a change of motive power creates no grants or licenses to the use of the streets, it is a mere act of regulation."

In *Louisville Trust Company v. Cincinnati*, 76 Fed. 312, the court says:

> "It seems somewhat difficult to see why a change of motive power should be *ultra vires.*"

Buckner v. Hart, 52 Fed. 835.

Hudson River Telephone Co. v. Watervliet, etc. Co., 135 N. Y. 393.

In Re Petition of N. Y. Elevated R. Co., 70 N. Y. 327.

State v. Trenton, 58 N. J. Law 666.

Patterson v. Grundy, 51 N. J. Eq. 213.

Halsey & Rapid St. Ry., 47 N. J. Eq., 381, 3 Am. Elec. Cases, 283.

North Chicago Ry. Co. v. Lakeview, 105 Ill. 207.

Sparks v. Railway, 212 Pa. 105, 110.

Howley v. Central Valley R. R. Co., 213 Pa. 36.

Taggart v. Ry., 16 R. I. 668, 19 Atl. 326.

3 *Thompson on Corporations*, 2nd ed., Sec. 2882, note 136, and cases there cited on

3 *Elliott on Railroads*, (2nd Ed.) Sec. 1096 S, note 89, page 76, Sec. 1096 R.

4 *Cook on Corporations*, (6th Ed.) page 3442 and note 2.

27 *A. & E. Encyc. of Law*, 17.

10 *A. & E. Encyc. of Law*, 881.

THE CITY CHARTER, SEPCIAL LAWS 1881, *DOES NOT CONTAIN ALL THE PROVISIONS OF LAW INVESTING THE CITY WITH ITS POWERS AND AUTHORITY.*

The appellant apparently proceeds and has proceeded upon the theory that the city of Minneapolis possesses no power or authority except as found in the city charter, Chapter 76 of the Special Laws of 1881. That is a clear mistake. In *State v. Minneapolis & St. Louis Ry. Co.*, 39 Minn. 219, the city of Minneapolis was authorized not by city charter but by the provisions in the railroad charter to compel the construction of bridges by railroads so as to restore a highway to its former usefulness. See also:

State ex rel. v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380.

State v. St. Paul, Minneapolis & Manitoba Ry. Co., 35 Minn. 131.

State v. District Court of Hennepin County, 42 Minn. 247.

St. Paul, Minneapolis & Manitoba Ry. Co. v. State of Minnesota, 214 U. S. 497.

Section 2916, Revised Laws of Minnesota, 1905, confers power upon the city not found in its charter. It reads:

> "When, in the location of any railroad, it becomes necessary to occupy any road, street, alley, or other public way, the municipal corporation or other public authority owning or having charge thereof and the railroad company may

agree upon the manner, terms, and conditions in and upon which the same may be used or occupied, or such corporation may appropriate so much of the same as shall be necessary by condemnation proceedings under the right of eminent domain."

This provision is like the section of Ohio Statute, 76 Fed. 308, giving authority to contract with street railways.

See also Section 2894, Revised Laws of Minnesota, 1905, which provides:

"The governing board of any municipal corporation may grant, sell, convey, or lease any public grounds within its corporate limits to any railroad corporation, subject to the rights of the original proprietors of such grounds."

Section 2843, Revised Laws of Minnesota, 1905, confers power on the municipality to purchase. Sections 2841 and 2842 of said Revised Laws recognize the power of the cities to grant franchises.

"All cities of the state, in addition to their ordinary powers, are invested with all powers of towns."

Bissell's Statutes at Large, p. 267, Sec. 110, Gen. Laws 1894, Sec. 1029.

Municipalities in this state are not as wanting in power and authority as counsel for appellant seems to believe. See the following

ILLUSTRATIONS WHERE CITIES AND VILLAGES OF THE STATE HAVE BEEN AUTHORIZED TO MAKE CONTRACTS.

We have quite a number of instances, where the Supreme Court of the state has held that cities and villages of the state have authority to enter into contracts with public service corporations. The Minneapolis, Lyndale & Minnetonka Railway Company entered into a contract with the city through this company whereby it was authorized to operate a steam motor line upon First Avenue in the city of Minneapolis. Several actions were brought against the Minneapolis, Lyndale & Minnetonka Railway Company, actions of ejectment, trespass, and an action to recover damages because the railway was an additional servitude upon the adjoining property. In *Newell v. Minneapolis, Lyndale & Minnetonka Railway Company,* 35 Minn. 112, the Supreme Court of the state held that the railway was not an additional servitude and that the plaintiff Newell was not entitled to recover damages. Unless there was a contract between the city and the Minneapolis, Lyndale & Minnetonka Railway Company, unless it was authorized by the state and the municipality to operate on First Avenue, it was a nuisance and Mr. Newell would have been entitled to compensation. Unless there was a contract, that case was wrongly decided. In *Duluth v. Duluth Street Ry. Co.,* 60 Minn. 178, the village of Duluth had the power to

enter into a contract with the Duluth Street Railway Company granting it the franchise to operate street railways within that village. In *Baumgartner v. City of Mankato,* 60 Minn. 244, the city of Mankato was held to have sufficient power to enter into a contract for street railway franchises. In *Northwestern Telephone Exchange Co. v. City of Minneapolis,* 81 Minn. 140, the city of Minneapolis was held competent to make a contract with the Northwestern Telephone Company. If it can contract for telephone franchises, can it not contract as to motive power on street railways? In *City of Duluth v. Duluth Telephone Co.,* 84 Minn. 486, the court held that the city of Duluth was capable of making a contract for telephone franchises. *Romer v. St. Paul City Ry. Co.,* 75 Minn. 211, indicates that the city of St. Paul had the power and authority to grant street railway franchises, for the Supreme Court lays down the rule of construction to be applied to municipal franchises. *State ex rel. City of St. Paul v. St. Paul City Ry. Co.,* 78 Minn. 331, also indicates that the city of St. Paul had the right to grant street railway franchises. *Nash v. Lowry,* 37 Minn. 261, holds that the city of St. Paul had the right when the ordinance was ratified to grant perpetual and exclusive franchises. In *City of Duluth v. Duluth Street Ry. Co.,* 88 Minn. 158, the power of the city to enter into a contract was necessarily the basis of the decision.

City of St. Paul v. St. Paul City Ry. Co., 92 Minn. 516.

City of Tower v. Tower & Soudan St. Ry. Co., 68 Minn. 500.

Abbott v. City of Duluth, 104 Fed. 833.

Anoka Water Works v. Anoka, 109 Fed. Rep. 580.

THE CITY OF MINNEAPOLIS IS ESTOPPED TO CLAIM THE WANT OF AUTHORITY TO AGREE AS TO THE MOTIVE POWER.

Citizens' St. Ry. Co. v. City Ry., 166 U. S. 557.

Denver, etc., Ry. v. Mayor, 5 A. & E. Cases, 8-13.

Herman on Estoppel, page 1363, section 1222.

Louisville v. Norton, 75 Fed. 884.

Potter v. Calumet, etc., Ry., 158 Fed. 528-529.

Penn. Mutual Life Ins. Co. v. Austin, 168 U. S. 685.

Hestonville, etc., Ry. v. Philadelphia, 89 Pa. 210.

Spokane St. R. R. v. Spokane Falls, 33 Pac. 1072.

Railroad Co. v. Joliet, 79 Ill. 25.

Railroad Co. v. People, 91 Ill. 251.

St. Louis, etc., Ry. Co. v. Belleville, 122 Ill. 376.

City of Chicago v. Union Stockyards Co., 164 Ill. 224.

EVEN SHOULD IT BE FOUND THAT THE CHANGE IN MOTIVE POWER WAS UNAUTHORIZED, THAT HAS NO BEARING ON THE RIGHT TO REDUCE FARE.

The People of the State of New Yorn v. Brooklyn Heights Railroad, 187 N. Y. 48.

Shreveport Trac. Co. v. Kan. City, 5 St. Ry. Rpt. 350.

Detroit City Ry. v. Mills, 85 Mich. 634.

Potter v. Street Railway, 83 Mich. 285.

Railway v. Orton, 32 Fed. Rep. 471.

Bridge Co. v. Prange, 35 Mich. 400.

Crolley v. M. & St. L. Ry., 30 Minn. 541.

St. Paul Gas Light Co. v. Sandstone, 73 Minn. 225.

See Note, p. 55, of Vol. 5, *A. & E. Ann. Cases.*

3 *Abbott's Municipal Corporations,* pp. 2023 and 2024.

3 *Abbott's Municipal Corporation,* pp. 2023 and 2031, note 805.

Williams v. The Citizens' Ry., 130 Ind. 71.

Old Colony Trust Co. v. Nichila, 123 Fed. 762.

Louisville Trust Co. v. Cincinnati, 76 Fed. 312.

We have thus far shown that the policy of the State of Minnesota is in favor of the protection of contract rights, and that the policy of THIS STATE differs from the policy of the States of Illinois and Texas, in which the *Freeport* case and the *San Antonio Street Railway* and other like cases were tried. We have also shown the rules of con-

struction applicable to public grants and to the reservations under discussion, and we have shown by paragraph 17 of the original ordinance of July 9, 1875 that the parties stipulated that the ordinance should constitute a contract. This was ratified by the legislature. We have shown that under *Nash v. Lowry* (above cited) and *Los Angeles Water* case the ratification of the ordinance made it a contract and that the City had power to contract as to change of motive power. We therefore now start out the next step in our discussion with an existing contract between the city and the railway company covering the subject of fare, a contract which by its terms is effective until July 9, 1923, and was therefore in EXISTENCE September 19, 1890, when the ordinance of September 19, 1890, which is said to have abrogated this contract, was passed by the City Council.

THE ORDINANCE OF JULY 9, 1875, WAS NOT REPEALED BY ORDINANCE OF SEPTEMBER 19, 1890, AND THE PROVISIONS OF SECTION 8 OF THE ORIGINAL ORDINANCE OF JULY 9, 1875, ON THE SUBJECT OF FARE STILL CONTINUES AS THE EXISTING CONTRACT BETWEEN THE CITY AND APPELLEE.

The appellant claims that the ordinance of September 19, 1890, (commonly spoken of as the Electric Ordinance—Fols. 35 to 39, rcd.) wiped out all of the provisions of prior ordinances. It is especially claimed that the reservations in said ordinance of September 19, 1890, authorized appellant to modify the rate of fare to be charged by the appellee of its patrons (For reservation see Fol. 38, rcd; see Fols. 79 and 81 as to the claim of the appellant as to the effect of this ordinance and as to the effect of the reservation referred to). An examination of the ordinance of September 19, 1890, discloses the fact that it does not pretend to be a complete ordinance governing the construction, maintenance and operation and the rate of fare of street railway companies. It is patent on examination that this ordinance has one main object, viz: the substitution of electricity as a motive power in place of animal and steam motive power used prior to that time. There is no provision in this ordinance specifying the streets on which the appellee shall operate its street railways, as in

the original ordinance. Section 1 (Fol. 35, rcd.) provides that "The Minneapolis Street Railway Company is hereby authorized to operate all existing lines of street railway and all its lines HEREAFTER CONSTRUCTED." "Hereafter constructed" are the only new words in this ordinance. The rest is simply a repetition of prior ordinances or resolutions (See Fol. 31, rcd.). The existing lines had been created and constructed under other and prior ordinances. This reference to existing lines of itself shows a manifest intention to continue the ordinance which authorized the construction of the then existing line. Section 2 provides that "all the lines of street railway in the city of Minneapolis heretofore constructed (under prior ordinance, of course) and now in operation, and all new lines and extensions of existing lines heretofore ordered (referring again to prior ordinances) or the building of which has by ordinance or resolution of said city council been authorized (by prior ordinance) shall be constructed, completed and fully equipped for operation by electricity as a motive power, the St. Paul line (authorized by prior ordinance), the Washington avenue line, the First avenue line (authorized by prior ordinance) on or before November 1, 1890; the Hennepin avenue and Harrison street railway lines (authorized by prior ordinance) on or before November 1, 1891, and all other lines on or before December 31, 1891. Section 3 provides "These lines shall be constructed of the standard guage and shall be built upon the most approved method so as to interfere as little

as practicable with all other public uses. Both material and workmanship shall be the best of their class and kind, and the cars used on said line shall be constructed and maintained with all the latest improvements for the comfort and convenience of passengers." The city was providing for the use of a new and dangerous agent in the propulsion of street cars, so this provision of Section 3 is needed to insure that this new electric motive power shall be so used and appliances so constructed as to interfere as little as practicable with all other uses. Section 5 provides that in the event the system of electric propulsion adopted by the company was not the best, then the city council would have a right to order the installation of a new and different system. Section 6 provides as to transfer. That section, among other things, says:

> "Said street railway company shall issue transfer checks at the junction of said lines at Washington and Hennepin avenues to any passenger on any of said lines who shall pay ONE FULL FARE" (Fol. 37, rcd).

What constitutes full fare cannot be determined by this ordinance of September 19, 1890. We have to refer to Section 8 of the ordinance of July 9, 1875, in order to determine what FULL FARE IS. This of itself is the clearest recognition that paragraph 8 of said original ordinance is still in existence. Section 7 provides for a license tax of $25 per car. Then comes Section 8, which contains the reservation for which so much is claimed. That section provides:

> "In the CONSTRUCTION, MAINTENANCE AND OPERATION of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is NOW IN FORCE" (Fol. 38, rcd.).

Notice the words "NOW IN FORCE." That refers to the ordinance of July 9, 1875. Why is not this the clearest recognition that the ordinance of July 9, 1875 was in force and effect and that it was to be continued in force and effect? By referring to this prior ordinance, the ordinance of September 19, 1890, clearly adopted said original ordinance and clearly recognized its continued existence. *Joyce Franchises,* Sec. 243, and cases cited. The city claims that the obligations resting on the company are continued but not any of the privileges of the July 9, 1875 ordinance are so continued. These restrictions and burdens would have continued without being mentioned. The ordinance is presumed to continue till the contrary appears. The contract is also presumed to continue until modified by the parties and only to the extent of the modification is the contract abrogated. The burden is on him who asserts a repeal of an ordinance or the merger or surrender of a contract. See cases cited, page 145, Brief. Counsel find fault with the construction by the court of the words "construction, maintenance and operation." The court

said these words did not reach the *regulation* of fare. It is patent that the words "fix or regulate fare" are the apt and common expressions for authority to regulate fare and not the word *"operation."*

The court adopted the evident construction of the parties. Sec. 1 of the original ordinance grants to the company the right to *construct* and *operate* a passenger railway, etc. If operation covered fare there was no need of Sec. 8, of the ordinance which provides "said company may REGULATE and *establish* fare." "City may *alter and regulate,*" and "City shall not *reduce fare.*" The parties put the subject of fare in a separate paragraph and not in connection with the section covering operation. The court hence simply followed the construction of the parties in which he was right. It is claimed that the words "And ALL OTHER ORDINANCES OF SAID CITY NOW IN FORCE OR HEREAFTER ADOPTED, SO FAR AS APPLICABLE" authorize the city to wipe out the contract contained in paragraph 8 of the original ordinance as to fare and permit and authorize the passage by the city of the assailed ordinance.

The words "and all other ordinances hereafter adopted" refer to legal ordinances, such ordinances as are not in violation of the constitution or which do not violate the laws of the state, or which the city has authority to pass. In *Railroad Co. v. City of Joliet,* 79 Ill. 25-44, the court says on page 44:

> "Some stress is laid upon a certain proviso in the ordinance of the common-council, of Jan-

uary, 1853, before referred to, which is as follows:

"'Provided, that said RAILROAD COMPANY SHALL BE SUBJECT TO ALL LAWS AND ORDINANCES THAT MAY HEREAFTER BE PASSED TO REGULATE RAILROADS IN THE CITY.'

"That only means, that the company should be subject to all REASONABLE AND LEGAL ORDINANCES FOR THE REGULATION OF THE ROAD."

The city had no legal authority to pass the assailed ordinance reducing fare; *first*, because the ordinance violated the contract clause of the Federal Constitution; *second*, the city may not have authority from the state to pass the ordinance. Hence it is incumbent on the city to show the assailed ordinance to be a legal ordinance.

There is no provision in this ordinance as to repeal of any prior ordinance. The ordinance of Sept. 19, 1890, itself is incomplete as a franchise ordinance. It does not cover all the subjects covered by the original franchise ordinance and does not come within the doctrine of the cases holding that a subsequent statute or a subsequent contract covering the entire subject acts as an implied repeal or an implied substitution or merger of the later or latest statutory provision or the latest contract in place of the prior statute or the prior contract.

Nicol v. St. Paul, 80 Minn. 415.

If the original ordinance has been repealed, it is by implication. That repeals by implication are not favored hardly needs the citation of authorities.

Moore v. Minneapolis, 43 Minn. 418.

Section 203, McQuillan Mun. Ord. reads:

"Ordinances may be repealed by implication. Thus where an ordinance contains a provision plainly repugnant to a former ordinance, to the extent that there is a conflict, the former ordinance is repealed by implication. So a subsequent ordinance fully covering the subject matter of an earlier ordinance, being a substitute therefor, repeals the former by implication, without words to that effect. But an ordinance which is described in the caption as amending a former ordinance, but in fact amending only one section thereof, and making no reference to the subjects of the other sections of the original ordinance, does not repeal the latter sections by implication where there is no repugnancy between the sections as amended and the others which were left unamended. So a subsequent ordinance providing for a city attorney's salary and fees in specified cases, in addition to a percentage on sums of money collected by him for the city provided for in a prior ordinance, does not repeal by implication the prior ordinance. Where there are two acts on the same subject, the rule is to give effect to both if possible, but if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. However, constructive repeals or repeals by implication are not favored. Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statute. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative or cumlative or auxiliary, and not inconsistent, both must stand, and the former is not repealed. Thus a general statute will not impliedly repeal a prior local or special statute, unless there is such a positive repugnance between the two that they cannot stand together or be consistenty reconciled. Since the

law does not favor a repeal by implication, it has accordingly been held that where two acts are seemingly repugnant, they must, if possible, be so construed that the latter may not operate as a repeal of the former. The earlier act remains in force, unless the two are manifestly inconsistent with and repugnant to each other. An act is not repealed by implication where the legislature had no intention to repeal it."

The following cases show how strong the rule is against implied repeal:

Moore v. City of Minneapolis, 43 Minn. 418.

Duluth v. Duluth Telephone Co., 84 Minn. 491.

State v. Peter, 101 Minn. 462.

Lewis' Sutherland St. Con., section 244, 276, 277, 247.

In *Uhrig v. Barnum,* 61 N. W. 749, the court says:

"A new contract with reference to the subject matter of a former one does not supersede the former, and destroy its obligations, except in so far as the new one is inconsistent therewith."

In *Anderson v. English,* 25 So. 748, 121 Ala. 272, it is held:

"In order to establish a change in the contract between the parties after it was made, the burden is upon the party asserting such change."

In *Schultze v. Shea,* 86 P. 117, 37 Colo. 337, it is held:

"Where in an action on a contract plaintiff claimed a modification of the original contract

to have been made, the burden was on him to show the same.

* * * *

In *Manning v. Seaboard Paint Co.*, 87 N. Y. S. 232, it is held:

> "A party to a written contract, claiming it was modified by a subsequent oral agreement, has the burden of proof."

In *Boyes v. Ramsden*, 55 P. 538, 34 Or. 253, it is held:

> "An agreement to modify a prior agreement must be established by clear and satisfactory evidence."

The presumption is that an ordinance once shown to exist continues in existence.

9 *Enc. of Evidence*, p. 909.

St. Louis Railway Co. v. Eggman, 161 Ill. 155.

Cleveland, etc. Ry. v. Bender, 69 Ill. App. 262.

WAIVER WILL NOT BE PRESUMED. A party relying upon a waiver of a condition in a contract must prove it by a preponderance of testimony.

13 *Encyclopedia of Evidence*, 1020.

In order to establish a waiver of an agreement the proof must be CLEAR AND CONVINCING.

Same citation and

Fox v. Harding, 7 Cushing, 516.

Where one party seeks to establish a waiver of a written agreement based upon the conduct of the other party it is incumbent upon the moving party to prove clearly not only his understanding of the contract, but that the other party had a like un-

derstanding regarding the effect of such conduct.

13 *Encyclopedia of Evidence,* 1021.

Benneck v. Insurance Co., 105 U. S. 355.

Holdsworth v. Tucker, 143 Mass. 369.

We have here an existing contract (by the acceptance of and legislative ratification of the ordinance of July 9, 1875) for the period of fifty years from July 1, 1873, and to continue until July 1, 1923. It is therefore incumbent upon the city, which challenges the existence of this contract, to show its repeal or modification by clear and explicit language in subsequent contract or subsequent ordinance.

In *McNeil v. Chicago City Railway Co.,* 61 Ill. 153, the court says:

> "If the company had intended TO SURRENDER ITS RIGHTS, there would have been no necessity for the circumlocution used, but it would HAVE SAID SO IN PLAIN AND UNEQUIVOCAL LANGUAGE. It should NOT BE DEPRIVED OF A VALUABLE RIGHT BY DOUBTFUL CONSTRUCTION."

No specific or direct language can be found in the ordinance of September 19, 1890, modifying or changing the contract of 1875 as to fares, but, on the other hand, a specific reference to the only ordinance (ordinance of July 9, 1875) which covers the subject of fare as THEN EXISTING. In the clause of the September 19, 1890, ordinance which says that transfers shall be issued to those who have "PAID A FULL

FARE" we have still another confirmation of the original ordinance and its continued existence. This is a recognition of the continued existence of Section VIII of the original ordinance because what is or constitutes a full fare can be determined only from Paragraph 8 of that ordinance.

In accordance with this principle it has been frequently held that the acceptance, even from the State itself, of a limited grant by one who holds a larger vested right, works no estoppel. In *Abbott v. City of Duluth,* 104 Fed. Rep. 833, it appeared that a telephone company had the right under its original charter to maintain and extend its lines on all the highways of the state, in perpetuity. It accepted an amendment to its charter giving it exclusive rights in the streets of Duluth and West Superior. This amendment was limited to ten years. It was held that its rights under the original charter were not lost by the acceptance of the amendment, but became revived at the expiration of ten years. The court said (p. 838):

> "The acceptance by the company of the special exclusive rights granted by the special acts for a fixed time, and presumably of value, cannot be construed as a refusal, disclaimer or surrender of the rights and powers granted to and vested in the company by the general law. There was no inconsistency. The company could receive and enjoy all the rights and powers given by the general law and the special acts. No election or disclaimer was required or expected. Both the general law and the special acts were beneficial, and will, therefore, be presumed to have been equally acted and relied upon."

In *Town of Golconda v. Field,* 108 Ill. 419, it appeared that certain persons being vested with title in fee to a ferry franchise sought for and obtained from the general Assembly a special act authorizing a ferry at the same place for twenty years. The supreme court said (p. 427):

> The complainants, when the act of 1859 was passed, were in possession of the ferry franchise which had been conferred originally on Daniel Field, and descended to them. They had an undoubted right to hold and operate the ferry under the original grant. They did no act indicating an intention to abandon title to the ferry but when the act of 1859 was passed they accepted its provisions, and held under it in connection with the original title. We do not think they waived any rights held under the original grant by accepting the provisions of the act of 1859, nor were they estopped from claiming under the original grant. If they thought the act of 1859 might strengthen their title to the ferry, we perceive no reason which would preclude them from accepting its provisions and at the same time retain the original title held by them when the act of 1859 was passed."

It seems to us that if anything can be made clear, it is the proviso THAT THE FARE SHOULD NOT BE REDUCED BELOW FIVE CENTS. It appears last and is indicative of the last legislative or contractual intent. See *Lewis' Sutherland Statutory Construction,* p. 668, Sec. 83.

The counsel for the city claim that the ordinance of September 19, 1890, has wiped out this contract as to fare, because of and by reason of the reservations found in Section VIII of the ordinance of

September 19, 1890, Fol. 38, rcd., which reads as follows:

> "Sec. VIII. In the construction, maintenance and operation of said lines of street railway, said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating street railways in the city of Minneapolis,' passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force, and all other ordinances of said city NOW IN FORCE OR HEREAFTER ADOPTED, SO FAR AS APPLICABLE."

In *City of Duluth v. Duluth St. Ry. Co.*, 60 Minn. 182, the court says:

> "If this proviso or saving clause means what defendant claims, it must be rejected as void, because repugnant with the enactment. It would fall within the principle stated by Lord Coke that, 'when the enactment and its saving clause are repugnant,—as where a statute vests a manor in the king, saving the rights of all persons, or vests in him the manor of A., saving the rights of A.,—the saving clause is to be rejected, because otherwise the enactment would have been in vain.' *Walsingham's Case*, 2 Plowd. 565; End. Interp. St. §§ 184, 185."

The saving clause referred to by the court in above case is as follows:

> "Said company shall, within thirty days after the passage of this ordinance signify its acceptance in writing of the rights and privileges hereby granted, and file such acceptance with the village recorder, and upon failure thereof the above grant shall not become operative, BUT NO RIGHT OR FRANCHISE NOW OWNED OR ENJOYED BY SAID

COMPANY SHALL BE FORFEITED OR PREJUDICED BY SAID ACCEPTANCE."

There is but one franchise ordinance all the while. When the original ordinance is amended the "amended ordinance only remains" *N. W. T. Co. v. Mpls.*, 81 Minn. 148, Black Interp. Laws, pp. 356-357. This amended ordinance contains Section VIII as to fares. If the reservation in ordinance of September 19, 1890, has the effect claimed for it, it destroys the grant or contract contained in said Section VIII, hence the doctrine of above case applies.

State v. Bates, 96 Minn. 113.

State v. Twin City Tel. Co., 104 Minn. 270.

Endlich on Interpretation of Statutes, Secs. 183, 184, 185.

Kansas Pacific Ry. Co. v. Commissioners of Wyandotte Co., 16 Kansas, 587.

Sams v. King, 18 Fla. 557.

Sutherland's Statutory Construction, Secs. 350.

Yarmouth v. Simmons, 10 Chancery Division, 518.

McCormick v. West Duluth, et al, 47 Minn. 272.

Dickerson v. Nelson, 4 Ind. 280.

State ex rel Wilson v. Williams, 8 Ind. 191.

Dennison v. Taylor, 15 Abb. N. C. 439.

Daniel v. Veal, 32 Ga. 589.

Shoenberger v. Lyon, 7 Watts & S. 184.

Banks' Adm'r. v. Marksberry, 13 Ky. 276.

Penick v. High Shoals Mfg. Co., 113 Ga. 592.

Cummings v. The People, 211 Ill. 400-406.

26 *Am. & Eng. Ency. of Law,* 2nd Ed., 681.

Venning v. Atlantic Coast Line Ry. Co., 58 S. E. 988.

Southgate v. Goldthwaite, 1 Bailey, 367.

U. S. v. Dickson, 15 Pet. (U. S.) 141, 11 L. ed. 689.

The Irresistible, 7 Wheat. (U. S.) 551, 5 L. ed. 520.

4 *Current Law,* p. 1543-1548.

Black on Interpretation of Law, Sec. 44.

Farmers' Bank v. Hale, 59 N. Y. 59.

Judge Lochren, in deciding the case in the court below, said the word "construction" did not mean fare; "maintenance" did not mean fare; and "operation" did not mean fare, and that the reservation consequently in Section 8 of this ordinance was not intended to touch the question of fare at all. Judge Lochren says (Fol. 252 rcd.):

> "Perhaps the only remaining proposition is whether this contract was changed by consent of the parties by the ordinance of September 19, 1890, which ordinance was accepted by the street car company, and which contained very many provisions which I need not refer to, because it is only claimed that this portion of the contract fixing the fare was changed by the 8th section of that ordinance, and which provided that, 'in the construction, maintenance and operation of said lines of railway said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitation and other provisions of an ordinance entitled 'An Ordinance authorizing and regulating the street railways in the city of Minneapolis, passed July 9, 1875, and approved July 17,

1875, as the same has been amended and is now in force'—that is the original ordinance—'and all other ordinances of said city now in force, or hereafter adopted, so far as is applicable.'

"Now, it does not seem to me that this touches the rates of fare at all. It says 'in respect to construction'—that is not fare. 'Maintenance'—that is not fare. 'And operation.' That is, how the cars shall be run and what shall be done in respect to that by the street railway company. The company shall be bound by the provisions of this original ordinance and other ordinances amendatory thereof, and all other ordinances of said city 'now in force, or hereafter adopted, so far as applicable.'

"Now, that is true; so far as relates to construction, maintenance and operation of these lines the street car company is, by the provisions of this ordinance, and its acceptance of this ordinance, bound; and it is subject to all these things; but there is nothing in this that would bind it to that change as to fares nor permit the council to make such change, nor agree to be bound by any change that the council might thereafter make with reference to the right of the street railroad company to collect fares. That in the original ordinance is a distinct provision. It comes under section 8 of the original ordinance and is a separate provision in respect to fares and the right of the company to collect fares. This provision in section 8 of the ordinance of September 19, 1890, has no reference to fare at all, but has reference to other subjects, and it certainly is a rule which the most vague ideas of equity would consider necessary to be applied, that there should be no forced construction of language of that kind used to broaden it and extend it to subjects which, apparently, were not by the parties intended to be included under it. It must be plain that both parties would understand naturally the scope and meaning of a provision of that kind, as not referring to

> fares, and the language must be such that the court could say that the parties must have understood that it did cover the subject of fares, or else it does not cover that subject. If there were other ordinances which were proper to be referred to in such a way relating to the construction, maintenance or operation of the road, entirely different from a matter of fares, and this general statement that ordinances in the future might be passed relating to the same subject, and, so far as applicable, would be binding upon the company, but would not by any reasonable or fair or honest construction be held to include the provision of this original contract in respect to fares. That was too important a matter."

It is the following seventeen words on which counsel relies for the authority to change the contract as to the rate of fare: "AND ALL OTHER ORDINANCES OF SAID CITY NOW IN FORCE OR HEREAFTER ADOPTED, SO FAR AS APPLICABLE." It does not say so far as applicable to street railways. It says so far as applicable, viz: so far as consistent. The burden is on city which seeks to change an existing contract to show that the word applicable as used in the ordinance does not mean so far as consistent with prior ordinances. These seventeen words also appear in the ordinance of September 27, 1889, providing for the construction of cable lines. So the new contract, if any was made, was made in 1889, not in 1890. The word "applicable" means "fitting" and "in harmony with." *March Thesaurus Eng. Words*, p. 57. *Soules Synonymous—Webster's Dictionary & Century Dictionary.* That indicates that the new

ordinances shall not conflict with prior ordinances. No repeal by implication takes place unless there in irreconcilable conflict. Hence the new ordinances are not to be repealing ordinances. The subsequent ordinance must be APPLICABLE, that is, in HARMONY with other and preceding ordinances.

The ordinances of the city of Minneapolis of 1889 and 1890, referred to, had but one subject in view, namely, the change of motive power by which street railways in the city should be operated. There were no provisions for new lines. No mention of rate of fare. This, the city admits (p. 183, city's brief). The original ordinance of 1875 provides for extensions of street car lines and it provides for the construction of new lines, and it provides for the forfeiture of any right in the street in the event of failure on the part of the company to build new lines or extensions. The ordinance of September 19, 1890, makes no such provision. The subject of new lines and extensions is not treated in the ordinance of September 19, nor is there any length of time specified in said last named ordinance as to the duration of the grant, license or permit given by said ordinance. Only one important thing was considered in that ordinance, viz.: the change of motive power. If the ordinance of 1875 is placed side by side with the ordinance of September 19, 1890, it is manifest at a glance that the latter ordinance does not cover the entire subject covered by the original ordinance of 1875, but simply and solely motive power and a few incidents to the change of motive power.

In order to make it doubly plain that the ordinance of September 19, 1890, cannot have the repealing effect claimed, let us, even at the risk of repetition, compare the provisions of the two ordinances. This examination should be made with the understanding (as announced in decisions) THAT THERE CAN BE NO REPEAL BY A SUBSEQUENT ORDINANCE unless there is a SPECIFIC REPEALING provision, or unless the SUBSEQUENT ORDINANCE *covers* the *entire subject*. *U. S. v. Henderson*, 11 Wall. 652; *U. S. v. Greathouse*, 166 U. S. 601, 605; *U. S. v. Healy*, 160 U. S. 136; *Cope v. Cope*, 137 U. S. 682; *U. S. v. Matthews*, 173 U. S. 381. That the ordinance of Sept. 19, 1890, does not cover the entire subject we now seek to demonstrate.

Section 1, of the original ordinance of July 9, 1875, provides (Fol. 7, rcd.):

> "That the Minneapolis Street Railway Company be and is hereby granted during the term of its charter the exclusive right and privilege of constructing and operating a single or double track for a passenger railway * * * in such streets of said city as said City Council may deem suitable to street railways * * "

There is no provision in the ordinance of September 19, 1890, granting the Minneapolis Street Railway Company, during the term of its charter (50 years) the exclusive right and privilege of constructing passenger railway lines in such streets of the city as the City Council may deem suitable to street railways.

Section 1 of the ordinance of September 19, 1890, (Fol. 35) provides that the,—

> "Minneapolis Street Railway Company, its successors and assigns are hereby authorized to *operate* (not one word as to CONSTRUCTION) all its existing lines of street railway in the City of Minneapolis, and all its lines hereafter constructed in said city, by electricity as a motive power; and to erect, construct and maintain upon and along the several streets and avenues of said city, where such lines are or may be located, all such poles, wires, conduits or other appurtenances and appliances as may be necessary to operate said lines of railway by electricity."

This section it will be noticed simply relates to motive power on existing lines and on future lines, and is no grant of authority to CONSTRUCT A RAILWAY, and consequently does not cover the grant covered by section one (1) of the original ordinance, but is supplementary and proceeds upon the assumption of a prior existing grant of the right to BUILD A RAILWAY IN THE STREETS of the city.

Section 3 of the original ordinance (Fols. 7 and 8) provides:

> "The City Council may at any time designate any other line of railway in the said city as a line demanded by the public necessities (i. e., new lines) and may also designate an extension of any existing line or lines; and in case said company upon being notified of such designation, shall not within such reasonable time as shall be fixed by the City Council, construct and put in operation such line then the City Council may charter to any other company the exclusive right to construct and op-

erate a street railway in the street or streets so designated."

Notice the important provision, PROVIDED THAT THE CITY COUNCIL shall have the right to designate such streets on which public necessities require the construction of street railway lines and may designate the extension of existing lines, and if the defendant in error fails to comply with the direction of the City Council in the building of such new lines and extensions, then the City may grant the right to other companies to build such new lines and extensions.

No corresponding provision is found in the ordinance of September 19, 1890. This is an important right which the city has surrendered and given up if the theory that the ordinance of September 19, 1890 supersedes and wipes out the original ordinance is correct.

Section 3 further provides:

"In case the said Minneapolis Street Railway Company shall at any time neglect to keep in operation any line of railway which it may have constructed, then, upon such reasonable notice as the City Council may prescribe, said company shall forfeit the exclusive right herein granted so far as the same pertains to such neglected line; and the City Council may grant the exclusive right to any other person or company to build and operate a street railway upon such neglected line."

No corresponding provision is found in the ordinance of September 19, 1890. Here again is another valuable and important right which authorizes the City Council to compel the careful opera-

tion of every line of street railway in the city, prescribing the remedy for neglect in the operation, and giving the city the right upon the neglected line to grant the right to operate it to any other street railroad company.

Section 4 of the original ordinance (Fol. 8) provides as to motive power. This is the only section affected, modified or changed by the ordinance of September 19, 1890, except in some minor details relating to transfers, which are covered by section 8 of the original ordinance, and also by the resolutions of July 19, 1889 (Fol. 25, rcd.).

By section 4 of the original ordinance it is provided that no propelling power or machinery of any sort shall be used after it shall prove to be a public nuisance. There is no such provision in the ordinance of September 19, 1890. Here again is a valuable right surrendered by the city if the contention of plaintiff in error is true.

Section 5 (Fol. 9), of the original ordinance provides that:

> "Said tracks and railway shall be used for the purpose of transporting passengers and freight, and the cars and carriages for that purpose shall be of the BEST STYLE AND CLASS USED ON SUCH RAILWAYS IN OTHER CITIES; provided said company shall at all times have the right to use their track for transportating iron, ties and other material for constructing their road and keeping the same in repair, and for such other purposes as from time to time may be necessary in carrying out any CONTRACT OR ENGAGEMENT THAT may be hereafter entered into by and between the City of Minneapolis and said Company."

There is no provision in the ordinance of September 19, 1890, which covers the provisions of said Section 5. The tracks may be used for the purpose of transporting iron, ties and other material for constructing the road and keeping the same in repair. It also provides that the City and the Railway Company may contract with each other with reference probably to the handling of freight and material that the city may need in the paving of its streets and highways. A valuable right, not only to the city but to the company is thus contained in the latter part of section 5. No similar right is found preserved in ordinance Sept. 19, 1890.

Section 7 of the original ordinance (Fol. 10, red.) provides:

> "The said City of Minneapolis shall not be held liable to said company for any damage that may be occasioned by the breakage of any gas or water pipes, or for any delays that may be occasioned by the construction of sewers, laying of water or gas pipes, or from the improvement or repair of any streets, unless there be unreasonable delay in making such repairs. The City of Minneapolis hereby reserves the right to take up and remove the said rails of the said road whenever it shall be necessary for the repair or improvement, * * * at the cost and expense of the company, whenever required."

No such provision is found in the ordinance of September 19, 1890. Section 9, of the ordinance of September 19, 1890, comes the nearest (Fol. 38). That section provides:

> "The said street railway company shall hold the City of Minneapolis harmless from all dam-

> ages of any kind whatsoever which may be caused by the work of construction in connection with putting up or maintaining POLES OR ELECTRIC WIRES."

Nothing in that ordinance gives the City the right to move the tracks of the street railway company whenever the same may become necessary in making improvements in the City street, or protects it against damage from construction of railway.

Section 8, of the original ordinance (Fol. 11, rcd.) covers RATE OF FARE, and there is no corresponding provision in the ordinance of September 19, 1890, which gives the City the right to regulate fares. The only reference to fares is found in section 6 of the ordinance of September 19, 1890 (Fol. 37, rcd.) which provides:

> "Said street railway company shall issue transfer checks at the junction of said lines, at Washington & Hennepin Avenues, to any passenger on any of said lines, who shall pay one FULL FARE, which transfer check shall entitle the passenger so receiving the same to a continuous passage on either of said connecting lines, * * * "

What constitutes a FULL FARE cannot be determined by this ordinance. It can be determined only by reference to Section 8 of the original ordinance (Fols. 10 and 11, rcd). It is, therefore, patent that instead of superseding and wiping out the original ordinance on the subject of fares, it is a CLEAR RECOGNITION OF ITS CONTINUED EXISTENCE.

Section 9 of the original ordinance (Fol. 11) provides:

> "The Council of the City of Minneapolis hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads during the continuance of the rights and privileges hereby granted."

Police regulations are hereby reserved solely as to OPERATION AND MANAGEMENT. If "police regulation" was intended to cover the subject of fare it seems to have been purposely omitted by this section, for the "police power" is reserved only as to *operation* and *management*, and not as to fare. There is no corresponding provision in the ordinance of September 19, 1890.

Section 10; of the original ordinance (Fol. 11) provides:

> "Said tracks shall be laid in the center of the street in all cases where it is practicable to so lay them, and said tracks shall not be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to be avoided, and said company shall keep the space between the rails in proper repair, so as not to interfere with travel over the same, and shall keep the same in proper order as to cleanliness at its own cost and expense."

There is no provision in the ordinance of September 19, 1890, which provides that the tracks shall not be laid nearer than 12-ft. of the sidewalk, nor is there any provision in that ordinance which requires the company to keep the space between the rails in proper repair nor is there any provision which provides that it shall keep the same in proper order as to cleanliness at its own cost and expense.

Section 11, of the original ordinance (Fol. 11, rcd.) provides:

> "The cars of said company shall be entitled to the track, and in all cases where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person wilfully obstruct, hinder or interfere with any of said railway cars, by placing, driving or stopping, or causing to be driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across, along or near the track of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell or otherwise, and whoever shall wilfully violate any of the provisions of this section shall, upon conviction thereof by the Municipal Court of said City, be punished by a fine of not more than fifty nor less than five dollars," etc.

There is no provision in the ordinance of September 19, 1890, upon this subject whatsoever. There is no provision for the punishment of persons who obstruct street railway cars in that ordinance. Nor is there any provision as to the relative right of the railway company and vehicles while upon the railway track.

Section 12 of the original ordinance (Fol. 12, rcd.) provides:

> "It shall be the duty of such company to furnish and run a sufficient number of cars to accommodate thetraveling public on all streets, which they shall use or occupy for railroad purposes. All cars shall carry signal lights after dark."

There is no provision in the ordinance of September 19, 1890, covering the subject of this im-

portant right. This section gives to the city the right to require the railroad company to furnish sufficient cars. It also requires that the cars shall carry lights after dark. Nothing of this kind appears in the ordinance of September 19, 1890.

Section 13 of the original ordinance provides (Fol. 12):

> "It shall be the duty of said company to repair any and all damages done to the streets, curbs, sidewalks, gutters, or other public property by the construction or repairing of the tracks along the streets, as herein provided for; and further, to protect and save harmless the city of Minneapolis against claims for damages arising from the CONSTRUCTION or MANAGEMENT of tracks and roads provided for herein."

There is no like provision in the ordinance of September 19, 1890, except as to poles and electric wires found in section 9 of the ordinance of September 19, 1890 (Fol. 30, rcd.). This provision does not cover the same ground that is covered by section 13 of the original ordinance. The city is saved harmless by latter section, from all damages arising from the *construction* and *management* of railways; not simply from damages arising from the erection of electric poles and wires, provided for in Sep. 19, 1890.

Section 14, of the original ordinance (Fol. 12, rcd.) provides for the construction of tracks upon bridges in the manner provided for by the committee on roads and bridges. No similar provision is found in the ordinance of Sept. 19, 1890.

Section 15 of the original ordinance (Fol. 12, rcd.) provides:

> "That the Minneapolis Street Railway Company is obligated to make terms with the St. Paul Street Railway Company so as to allow each of said railway companies to run its cars into the business centers of each of said cities over the tracks of each other without change of cars between the two cities of St. Paul and Minneapolis."

There is no such provision in the ordinance of Sept. 19, 1890.

Section 16, of the ordinance, gives the rules and regulations for the running of cars. Among other things it provides for a speed of six miles an hour. This has been changed to eight miles an hour by ordinance of September 19, 1890.

It is provided in Section 16 of the original ordinance (Fol. 13) that cars driven in the same direction shall not approach each other nearer than 200-ft. There is no such provision in the September 19, 1890, ordinance.

Section 16 of the original ordinance also provides:

> "No car shall be allowed to stop on a crosswalk nor in front of any intersecting street, except to avoid collision or to prevent danger to persons in the street or to take in or leave off passengers."
>
> The conductors and employes employed by said company shall use reasonable care and diligence to prevent injury to persons, and on the appearance of danger to any one on or near the track the cars shall be stopped, when by so doing, such injury may be averted."
>
> "All proper care shall be used by conductors

and employes to prevent injury to teams, wagons, carriages and other vehicles.

"The conductor shall use proper diligence to prevent ladies, or children under twelve years of age, from leaving or entering the cars while in motion.

"Conductors shall announce to passengers in a distinct tone the names of all streets crossed as the cars approach such cross-streets, and they shall observe the same rule when nearing the track of any other railway company.

"No car shall remain standing at any of the stations more than ten minutes, except at each end of the lines, and at the stations nearest the passenger depots of any other railway companies, at which excepted stations they may stand a longer time" (Fol. 14, rcd.)."

There are no such provisions in the ordinance of Sep. 19, 1890. As before stated by placing these two ordinances side by side and comparing them, we discover that the ordinance of September 19, 1890, does not cover the entire subject of the ordinance of July 19, 1875, but is practically limited to the subject of motive power. This is further strengthened and confirmed by an examination of the resolutions of 1889 and 1890, which preceded this ordinance of September 19, 1890. In fact, everything that is granted and covered by the ordinance of September 19, 1890, is covered and disposed of by these resolutions of 1889 and 1890, save and except future lines. Motive power upon existing lines had already been given and provided for (see Fol. 35, rcd.).

In order to demonstrate how fully the prior resolutions and ordinances provide for the change of motive power, let us take some time in examining

these prior resolutions and ordinances. At Folio 19 of the paper book we find a communication from President Thomas Lowry to the effect that:

> "The Street Railway Company will build a cable line on the line now operated by the motor, from Washington avenue or the Union Depot to Thirty-first street, and have completed as soon as possible, commencing work at once."

On the 29th day of June, 1889, the city council passed a resolution accepting the proposition of the Minneapolis Street Railway above, and directed the proper city officers to enter into a contract with the street railway company agreeing that "if said street railway company shall build a cable line on the line now operated as a steam motor line," etc.

On the 19th day of July, 1889, the city council passed another resolution providing for the change of motive power upon the street railway lines of the defendant in error (see Fols. 20 to 26, rcd.). It provided for the construction of three cable lines:

> "First. A cable line beginning at Twelfth Avenue North, * * * to the corner of Washington Avenue South and Cedar Avenue, * * * and when completed, the said Minneapolis Street Railway Company shall operate in connection therewith the following horse car lines, (naming several).
>
> "Second. A cable line beginning at the corner of Bloomington Avenue and Thirty-second Street South, * * * to the Union Depot at High Street, * * * and when completed the following horse car lines shall be operated in connection therewith, (naming two lines).
>
> "Third. A cable line from the intersection of Lyndale and Hennepin Avenues * * * to Harrison Street * * * to Twenty-ninth

Avenue North-east, * * * and when constructed and put in operation, all the East Side horse car lines, * * * shall be operated in connection with this line, etc.

"Said cable lines shall be constructed with double tracks, * * * shall be constructed of 'standard guage,' and the rail used shall be what is known as the 'Providence girder rail.' The slot or opening shall not exceed five-eighths of an inch. * * * No cable line shall be speeded at less than eight miles an hour," etc.

Then the resolution provides that the city council may designate one of the present (that is, existing) street railway lines upon which the Minneapolis Street Railway Company shall experiment with electricity as a motive power.

"This experiment shall be put in operation not later than six months after such line has been designated, and when electricity, applied in any form upon such experimental line, shall have proved a practical success, then the street railway company may, AND WHEN ORDERED TO DO SO, SHALL, THEREAFTER OPERATE ELECTRIC LINES WITH THE POWER APPLIED IN THE MANNER which has PROVED A PRACTICAL SUCCESS on such experimental line upon such existing horse car lines as the city council may designate as suitable for electric street railways."

The resolution continues:

"Be it further resolved, That * * * PUBLIC NECESSITIES demand the street railway extensions and the new lines hereinafter named and that therefore the Minneapolis Street Railway Company be, and is hereby, required to construct and operate such extensions and new lines within the time hereinafter stated."

This is under Section 3 of the original ordinance of July 9, 1875 (See Fol. 7, rcd.), and is conse-

quently a recognition of the existence thereof. Then follows a long list of lines to be built under that resolution. It is then further provided (Fol. 24, rcd.):

> "That if the operation of said experimental railway line by electricity shall prove a practical success, said company is HEREBY AUTHORIZED AND REQUIRED TO CONSTRUCT and operate an electric street railway line beginning at Twenty-seventh Avenue Northeast and Sixth Street Northeast, * * * thence to Adams Street and Central Avenue."

Also an experimental line from Thirty-four Avenue North and Penn Avenue to Twentieth Avenue North and Washington Avenue is also provided for. Then it is provided that the street car company shall pay $25 license on each car. It is next provided that the system of transfers shall issue to any passenger on any of its connecting lines who shall pay *one full fare.* It is then further provided that the company shall give a bond in the sum of $225,000, conditioned that the defendant in error will carry out the provisions of the resolution. This resolution was accepted by the company (Fol. 27, rcd.), and carried out.

On the 27th day of September, 1889, the city council of the city of Minneapolis passed an ordinance (Fols. 29 and 30, rcd.) authorizing the Minneapolis Street Railway Company, its successors and assigns, to construct and maintain a double line of street railway, with double tracks upon the following streets (naming quite a number), and to operate the same by electricity as a motive power, and erect and maintain upon and along said streets

poles and wires. Said line shall be constructed and in operation on or before the first day of July, 1890, (two months and nineteen days before the passage of the September 19, 1890, ordinance).

On the 17th day of January, 1890, the city council passed still another ordinance requiring the Minneapolis Street Railway Company to substitute an experimental electric railway line upon certain streets. This resolution further provided:

> "If at any time on or before April first, 1891, (to-wit, before the lines could be constructed under the September 19, 1890, ordinance) the city council shall determine any or all of said electric lines to be unsuccessful or not equal to the cable lines ordered, then this resolution shall be of no further force or effect, and the council may order cable lines substituted for said electric lines and may discontinue electricity as a motive power" (Fol. 31, rcd.).

This resolution contains the following significant proviso:

> "The provisions of said resolution of July 19, 1889, AND ALL OTHER ORDINANCES AND RESOLUTIONS OF THE CITY COUNCIL SHALL NOT BE MODIFIED OR AFFECTED HEREBY EXCEPT IN THE PARTICULARS ABOVE INDICATED" (Fols. 31, 32, rcd.).

What stronger language could be devised for the purpose of continuing in operation prior ordinances and resolutions? That was only a few months before the alleged repealing ordinance of Sept. 19, 1890.

There were passed two more resolutions on the 28th day of March, 1890, providing for the building

and electrifying of two horse car lines, subject to all the regulations and limitations relating to the present electric lines (Fol. 42, rcd.).

We can see from this history of the change of motive power upon our street cars that all rights as to existing lines were vested in the company before the passage of the September 19, 1890, ordinance. What has become of these resolutions if the theory of the city be correct. Does it wipe out the resolutions of January and March, 1890? The statement of the facts itself is a complete answer. Has it wiped out the provision found (Resolution of January 17th, 1890) at Folio 33 of the record, providing that the street railway company shall strengthen the bridges over which it may be compelled to pass in making the change from one motive power to another by reason of the increase in the size of cars? That is a valuable right, which the city naturally would like to preserve. This resolution provides:

> "If the said city council shall not at any time on or before April 1st, 1891, determine electricity to be an unsuccessful motive power, then the said Minneeapolis Street Railway Company SHALL equip with electricity and put in running order ALL ITS THEN EXISTING HORSE CAR OR MOTOR LINES by December 1st, 1891 (Fol. 32, rcd.). Unless council determines to the contrary the railway must electrify all lines."

This review of the various ordinances which led up to the ordinance of September 19, 1890, seems to be a complete demonstration that the purpose of all these resolutions and ordinances, including the or-

dinance of September 19, was solely to provide for a new, efficient and better motive power. If animal power should have been used to transport the number of people now being transported by street railway within the city, these animals would be so numerous as to make a continuous procession and of themselves become a nuisance, and it seems almost puerile for any one to contend that the city council did not have the right to enter into a contract with the street railway company for the purpose of changing this motive power from a bad one to a better one. This was a contract for the benefit of the public, and should receive, as already stated, a liberal construction instead of a strict construction which would prevent the municipality from securing to its inhabitants the benefits of new inventions.

1 *Thompson Corp.*, 2nd Ed., p. 341, sec. 309, quoted in part above.

Section 2 of the ordinance of September 19, 1890, provides for the time in which the line shall be installed. Section 3 provides that lines shall be so constructed as to interfere as little as practicable with other public uses of the street. "Other public uses of the street" probably means telephone lines and electric power lines. Section 4 of the September 19, 1890, ordinance provides that no more than two cars shall be attached together. Section 5 provides that a new system of electric street railway may be introduced if the present overhead system proves inadequate, thereby guarding the city against any inadequate power. Section 6 provides

for the running of cars to the end of the line, and for transfers. This contradicts the statement of the brief of counsel for plaintiff in error as to the distance that a passenger is now entitled to ride on the present fare. Section 7 provides amply for a license of $25 per car. Section 8 contains the reservation upon which the plaintiff in error relies as a justification for the passage of the assailed ordinances, and need not be here repeated. Section 9 of the September 19, 1890, provides that the city shall be kept harmless from all damage of any kind whatsoever by reason of the construction of POLES AND ELECTRIC WIRES. Not one word is said about reserving any right to the city to be protected from any damage resulting from the construction of the railway. Section 10 provides for the acceptance of the ordinance in writing. Section 11 provides for the taking effect of the ordinance. Section 1 does not provide for the construction of any railway. It simply provides for the use of electricity upon existing lines and for the right to erect poles to carry the wires for such electrification.

From what we have said, and from the comparison that we have made of the two ordinances, that of July 9, 1875, and that of September 19, 1890, it is difficult to escape the conclusion that the July 9, 1875, ordinance is still in existence, and that the September 19, 1890, ordinance recognizes its continued existence, and especially does it recognize the continued existence of section 8 of the original ordinance of July 9, 1875, because the September 19, 1890, ordinance says that transfers shall be is-

sued to those who have paid *one full fare,* and what is full fare can only be determined by a reference to said section of the original ordinance.

THE RESERVATIONS CONTAINED IN SECTION 8 OF THE ORDINANCE OF SEPTEMBER, 19, 1890, DO NOT AUTHORIZE THE CITY TO PASS THE ASSAILED ORDINANCE, OR AUTHORIZE THE CITY TO REGULATE THE FARES OF THE COMPANY SAVE AND EXCEPT AS PROVIDED IN SECTION 8 OF THE ORIGINAL ORDINANCE.

We shall first invoke the rule of construction above stated in *Lewis' Sutherland St. Con.,* Vol. 1, p. 444, to the effect that an amended ordinance must be considered as one ordinance, as if the ordinance had been originally enacted in the amended form.

In *Blair v. Chicago,* 201 U. S., the court says on page 475:

> "As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *People v. Circuit Judge,* 37 Michigan, 287. In *Conrad v. Nall,,* 24 Michigan, 275, a section in the chapter of the code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one act. The rule is correctly stated in *Endlich on Statutes,* section 294, as follows: 'A

statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself becomes so thoroughly a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated.'"

Holbrook v. Nichol, 36 Ill. 161-163.
Farrell v. State, 54 N. J. L. 421-423.
Dexter, etc. Co. v. Allen, 16 Barber, 15.
Drew v. West Orange, 64 N. J. L. 483.
McKibbin v. Lester, 9 Oh. St. 627.
Ely v. Holton, 15 N. Y. 595.

It is the claim of the city that the words "All other ordinances of such city now in force or hereafter adopted so far as applicable" destroy the words "provided that the city shall NOT REDUCE THE PASSENGER'S FARE BELOW *FIVE* CENTS over any one continuous line." If the section had been originally drawn with the reservation in it there would have been no doubt but the construction now contended for it by the city necessarily would have been rejected. It violates the rule above quoted which provides that a proviso which destroys the grant must be rejected as void. *City of Duluth v. Duluth Street Railway Co.*, 60 Minn. 182, above quoted.

3 *Thompson on Corporations*, section 2875 and section 326, above quoted, and page — of this brief.

State ex rel Bates, 96 Minn. 113.

It seems further patent that this reservation was not intended as a repeal or an amendment of Section 8 of the original ordinance. Counsel for the city make an admission which disposes of any claim that the original ordinance as to fares has been repealed. The presumption is that the original will continue. In order to repeal that ordinance there must be either a direct or implied repeal. There is no direct repeal, and unless there is an implied repeal the ordinance continues in force. At page 183 of the city's brief counsel say:

> "(g) If Section 8 of the ordinance of September 19, 1890, does not (as contended by complainant's counsel and as held by the Lower Court) touch or affect the provisions of the previous ordinance in relation to rate of fare and length of ride, then there is absolutely NOTHING IN THE ORDINANCE OF SEPTEMBER 19, 1890, TOUCHING THOSE SUBJECTS, and, consequently, THERE CAN BE NO CONTRACT WITH REFERENCE TO RATE OF FARE."

From the above it is conceded by the city that the September ordinance does not touch the subject of fare. If it does not touch the subject of fare, then it follows of necessitay that there is no implied repeal of the original ordinance on that subject.

The reservation contained in the ordinance of Sept. 19, 1890, to the effect that the company shall be subject to *such future ordinances as may be applicable* means what? Does it mean what is claimed for it by the city? Does it give the right to the city to regulate fares without the consent

of the company? Is it likely that the street railway company, which had a fixed rate of fare by the original ordinance, for a fixed period of duration, to-wit: fifty (50) years from July 1, 1873, should abandon the right for a fixed time to a fixed fare for the sake of obtaining the right to use a new motive power on FUTURE LINES for it had already received by resolution of January 17, 1890, the right to use electricity on existing lines (Fol. 31, rcd.) and thereby subject the company to reduction in fares and termination of its franchise at any moment at the sole will and election of the city council, even on existing lines? This is the necessary result of the claim of the city and is impossible. If the ordinance of 1890 is a mere license or permit, then it may be ended at any moment and the railway company is without remedy and must bear it without complaint. It is difficult to avoid the conclusion that the city's claim in this respect leads to a plain absurdity. It must be conceded that a contract was entered into between the city and the railway company by the ordinance of 1875, and it must be conceded (and if not conceded it is herein established) that this contract still continued and was an existing contract at the date of the passage of the ordinance of 1890, and if there was an existing contract on September 19, 1890, the city must point to clear and explicit language used in the ordinance accepted by the railway company to relinquish and abandon that contract right, language equally definite and certain with the language which created the contract in the

first place. This surrender of the existing contract of 1875 should not rest in surmise and speculation or doubtful construction. The language from *New Orleans v. Tel. Co.*, 2 Am. Elec. Cases, p. 126, seems very pertinent here.

In *New Orleans v. Telephone & Telegraph Co.*, 40 La. Ann. 41, 2 Elec. Cases, 122, at page 126, the court says:

> "The main contention of the city, however, is that the second section of the ordinance robs it of the features of a contract, and converts the authority granted into a mere revocable permit. The section is as follows:
>
> " 'That all the *acts and doings* of said company *under* this ordinance shall be subject to any ordinance or ordinances that may hereafter be passed by the city council concerning the same.'
>
> "The city's construction of this section is strained and unreasonable, and conforms neither to its spirit or letter.
>
> "It is not conceivable that the grantee would have invested its means in such an enterprise, had it imagined that the terms and conditions of its enjoyment of the privilege lay at the entire mercy of the city. If such unreasonable intention lurked in the minds of the council which passed the ordinance, the grantor, under familiar rules of construction, came under the obligation of expressing it clearly and unambiguously.
>
> "But what is it that is subject to regulations and control by future ordinances?
>
> "It is *'the acts and doings of said company under this ordinance.'* This assumes that the ordinance itself is to continue in full force and effect, and certainly reserves no power to repeal, destroy or alter it in any of its essential features and considerations. It recognizes the

> right of the company to act and to do under and according to the ordinance, only subjecting such 'acts and doings' to municipal regulations not conflicting with the ordinance itself.
>
> "We consider that the imposition of the additional and burdensome consideration here involved is not within the scope of the rights reserved."

On September 19, 1890, when the ordinance which the City claims repealed the original ordinance of 1875 was passed, the railway company was facing the expenditure of millions of dollars in order to carry out the proposed change. The company was under strict obligations to build cable lines; to experiment with electricity, and under obligations to replace electric lines with cable lines in the event of electric power proving inadequate. That was HARDLY THE TIME FOR DISCUSSING THE QUESTION OF REDUCTION OF FARE. At that time it was not likely that the company would have consented to an arrangement whereby its rate of fare could be modified and fixed at any moment at the sole will of the common council of the City of Minneapolis.

In *Citizens' Railway case,* 166 U. S. 557, the court says, on page 570:

> "In fact the ordinance had but a single object, which was to permit the substitution of electric for animal power, and it is scarcely possible that, if either party had understood that the franchise was to expire in January, 1894, four years from the time the electric ordinance was adopted the complainant company would have entered upon the work of changing

its entire system of street railway into an electrical system and incurred the very large expense necessary for that purpose, knowing that before it could reap any substantial return from such an investment its rights in the streets of the city would expire by limitation. The improbability becomes the more apparent when it is considered that it was under no compulsion to make the change, and might, at its option, have continued the use of horse power until the original franchise had expired.

"We are, therefore, of opinion that the complainant company had a valid contract with the city, under the original ordinance of January 18, 1864, as amended by the ordinance of April 7, 1880, which will not expire until January 18, 1901, and that the contract and ordinance of April 24, 1893, with the defendant company is invalid, in so far as it may be construed to interfere with the complainant in the CONSTRUCTION, OPERATION AND MAINTENANCE OF ITS STREET CAR SYSTEM IN THE CITY OF INDIANAPOLIS."

In *Old Colony Trust Co. v. City of Atlanta,* 83 Fed. 44, on page 44 the court says:

"4. It is further insisted that the power to pass this ordinance exists by reason of the reservation made by the city in the ordinance authorizing the Atlanta Consolidated Street Railway Company to use the streets and to electrically equip its lines. There is some difference between counsel as to the exact language of this ordinance, but, giving it the broadest meaning in favor of the city it provided that the company should be 'subject to all the laws and ordinances now in force and such as may be hereafter made.' Of course this ordinance should be treated as contended for by counsel for the Consolidated company, and the word 'legally' should be read into it, and it should read as

though it said such ordinances 'as may be hereafter legally made.'"

In *C. R. I. & P. R. R. Co. v. Joliet*, 79 Ill. 25, the court says, at page 44:

> "Some stress is laid upon a certain proviso in the ordinance of the common council of January 3, 1853, before referred to, which is as follows: 'PROVIDED, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city.' That only means that the company should be subject to all REASONABLE AND LEGAL ORDINANCES for the regulation of the road. It had no such scope, that the railroad company should abandon or take up and remove its tracks at the bidding of the common council."

In *Owensboro v. Owensboro Water Co.*, 191 U. S. 358, the court says, on page 370:

> "It would ignore the distinctions made by the section and give besides, the words 'rules and regulations' too large a meaning to make them include the power of fixing rates to consumers. They have adequate and useful signification without that. There were many things in the supply of water to consumers and in the orderly and prudent conduct of the business of the company which might need rules and regulations."

City of Minneapolis v. N. W. Tel. Co., 81 Minn. 140.

McNeil v. Chicago, 61 Ill. 153, quoted above.

Los Angeles Water Co. v. Los Angeles, 177 U. S. 579.

Citizens' Railway Case, 166 U. S. 557.

Shreveport Traction Co. v. Shreveport, 47 So. 41.

One of the most important parts of the contract, as far as the street railway company was concerned, was that part which provided for the rate of fare that it was entitled to or should be entitled to charge for the transportation of passengers. Equity would seem to require that this important provision of its contract should not be taken away without some certain and known act on the part of the company, for whose benefit that provision was first inserted in the ordinance. It should not be taken away by doubtful language. What legitimate meaning can be given to these seventeen words which would be in harmony with all the surrounding facts and circumstances, and which would reserve to both parties their contract right as everybody seemed to have understood them at the time. A new power—a dangerous power—electricity, was to be applied to the operation of street railways. No one could tell what dangers the future might disclose in the operation of street railways cars by means of that dangerous power. The former rules and regulations clearly would not cover the case. Consequently it was simply the part of prudence on the part of the city council to add some new regulation that had not appeared in prior ordinances, and for that reason it seemed very likely that the city inserted these seventeen words, to-wit: *"and all other ordinances of said city now in force or hereafter adopted, so far as applicable"* to cover the new conditions resulting from the new dangers that might flow from this dangerous motive power.

The city of Detroit had practically the same experience as Minneapolis is now having under a reservation that is remarkably similar to the reservation quoted from the ordinance of September 19, 1890. We find the following reservation in an ordinance by the city of Detroit, quoting now from the *City of Detroit v. Ft. Wayne & Belle Isle Ry. Co.*, 95 Mich. 456:

> "A reservation in the ordinance under which a street railway company is operating, of the right 'to make such further rules, orders, or regulations, as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public,' includes the right to enact an ordinance requiring the company, for the accommodation of the public, to keep tickets for sale upon its cars in the manner stated."

Upon this reservation the above action was brought in the state courts of Michigan to compel the railroad company to sell eight tickets for twenty-five cents on its cars under an ordinance which the company had accepted. The City Railway Company sold those tickets at certain depots; but the court held that under the reservation of the ordinance, the city was entitled to compel the sale of these tickets on board of the cars, instead of at these depots. That is exactly what resulted from the stipulation in the Smith decision referred to in the answer of the city in this case (Fol. 177, rcd). The city of Detroit apparently encouraged by the above quoted decision, very much as the city council of the city of Minneapolis was encouraged by the decision of Judge Seagrave Smith, passed an or-

dinance reducing the fare to be charged by the Detroit Citizens' Street Railway Company, relying in so doing upon the reservations relied upon in the *Michigan case,* with the result that the Supreme Court of the United States squarely held that the reservation relied on could not have the meaning and purpose contended for, and held that the fixing of rates, being among the vital portions of the agreement between the parties, it could not be supposed that there was any intention to permit the common council, in its discretion, to make an alteration which might be fatal to the pecuniary success of the company.

In *Detroit v. Detroit Citizens' St. Ry. Co.,* 184 U. S. 384, the court, at page 397, said:

> "We are then brought to the question of the reservations in the ordinances themselves. An examination of them leads us to the conclusion that not one provided or was intended to provide for a power to alter an agreement in relation to the rates of fare entered into between the parties. The right from time to time to make such further rules, orders or regulations as to the common council may seem proper, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers. We think, as was stated by the court below that this reservation permitted the city to make further rules or regulations than those contained in the ordinances, in regard 'to all matters incident to the CONSTRUCTION AND OPERATION OF THE ROAD, such as the location of the tracks in the streets, the placing of switches and turn-tables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks,

in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent, for the protection of life, the accommodation of the public, and the avoidance of injury to private property. Such regulations are not invasions of the contract rights of the company and are just and reasonable.' *Lake Shore & Mich. Southern Ry. Co. v. Ohio*, 173 U. S. 285, 305.

The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment, with regard to a right so fundamental in its nature, that there was any intention to permit the common council IN ITS DISCRETION to thereafter make AN ALTERATION WHICH MIGHT BE FATAL TO THE PECUNIARY SUCCESS OF THE COMPANY. For the reasons already given, we think the language used does not, in fact, give any such power to the common council. The ordinances of 1899 are, so far as this record shows, the first wherein the common council has assumed to make any CHANGE IN THE RATES OF FARE WITHOUT THE ASSENT OF THE COMPANY TO BE AFFECTED THEREBY. From 1862 to until 1899 there seems to have been no attempt to exercise this alleged power of alteration by the common council without the consent of the railway company. While the rate of fate existed as agreed upon between the city and the railway company, expenditures involving millions of dollars were entered upon, changing the mode of transportation from animal to electric power, and no claim seems ever to have been made on the

> part of the city of a right of alteration to be exercised in accordance only with its own views of reason and propriety. This in itself is a strong implication of the want of any such power under the various reservations set forth in the foregoing statement of facts and contained in the ordinances specified. But aside from that and considering only the nature of the right itself growing out of the agreement as to fares, we are of the opinion that no one of the reservations of the right to make further rules or regulations could by any fair construction be held to include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in those ordinances."

The language of the court just quoted was applicable not only to the reservations in the ordinances as to rules and regulations, but it also applied to the following language in Section 34 of the Tram-railway Act of 1855, which reads as follows (184 U. S. 372):

> "Provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city and under such regulations and upon SUCH TERMS AND CONDITIONS AS SAID AUTHORITIES MAY FROM TIME TO TIME PRESCRIBE."

As to this provision, the court said:

> "It is, however, urged that the terms employed in the ordinances under which complainant runs its different lines of street railways are not sufficient to constitute contracts, which may not be altered at the pleasure of the common council. It is said that at least in regard to the ordinances relating to those companies organized under the Tram-railway Act, no con-

tract can be found in them, as there was no special provision in that act for an agreement between the city and a company applying for the use of its streets, as to the rates of fare, and therefore a statement in an ordinance upon that subject would amount to no more than a license which might be altered or revoked at any time; and that if the language were a contract, it was in the power of the common council to alter or abrogate it under section 34 of the Tram-railway Act.

"It will be seen that under Section 34 of the Tram-railway Act, as it was enacted in 1861, a railway corporation organized under the act could not construct a railway through the streets of a city without the consent of the municipal authorities 'and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe.' Hence, it is argued that any terms or conditions under which the railway company obtained the consent of the municipal authorities might by the same authorities be from time to time altered as they should in their discretion think fit.'" * * * "The rate of fare is among the most material and important of the terms and conditions which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets. It would be a subject for grave consideration and conference between the parties, and, when determined by mutual agreement, the rate would naturally be regarded as fixed until another rate was adopted by a like agreement. Can it be possible that under this language permitting consent upon such TERMS AND CONDITIONS as the city might from time to time prescribe, the power was reserved to make a rate of fare which might ruin the whole enterprise? That a rate once deliberately and mutually agreed upon might be thereafter and from time to time altered at the pleasure of the

city alone? Will it be believed the parties thus understood the meaning of that provision? It would hardly be credible that capitalists about to invest money in what was then a somewhat uncertain venture, while procuring the consent of the city to lay its rails and operate its road through the streets in language which as to the rate of fare amounted to a contract, and gave the company a right to charge a rate then deemed essential for the financial success of the enterprise, would at the same time consent that such rate then agreed upon should be subject to change from time to time by the sole decision of the common council. It would rather seem that the language above used did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that, by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe, and efficient running of the cars, the character of service, the speed and number of cars, and their hours of operation and matters of a like nature, such as are described in the opinion of the court below in this case. Such would seem to be a reasonable construction of the language."

In *Northwestern Telephone Exchange Company v. City of Minneapolis*, 81 Minn. 148, the court says:

"We cannot agree with the court below that the provisions of section 5 of the ordinance of 1883, which provides for the removal of poles by direction of the municipality, CONTAINS A RESERVATION OF AUTHORITY IN THE CITY TO ENFORCE THE REMOVAL OF THE SAME AT ITS PLEASURE. Conceding that the provisions of Section 5 extend

to the whole ordinance—which we do not decide—and thereby authorized the city to order the removal of the poles from streets not being graded, such power cannot be unreasonably and arbitrarily exercised. This provision manifestly implies the exercise of judgment upon such necessities as are always liable to arise in improving the streets, to be enforced only for the public good in the administration of the municipal functions, under the authority of the police power. In a proper case, where the city exercises its power of control in the regulation of the use of the streets by the plaintiff, based upon necessity and the interests of the public, that power will be sustained. Beyond that limit it cannot go.

"The reservation in the ordinance of October, 1899, to the city, of the right to grant or refuse the occupation of the streets at its own will, is nothing better than a declaration of a right arbitrarily to grant or refuse the privileges to which it refers. The two ordinances of May and October, 1899, which upon their face and in the terms seek to amend the first underground ordinance of 1886, are to be read and construed together as one enactment; for, when such an amendment is adopted, there are not two separate enactments, the old and the new, but by their union there is produced one law, viz., the ordinance as amended. *Black Interp. Laws*, pp. 356, 357. When these ordinances are read together, as they evidently should be, under the facts admitted by the demurrer they are, as a whole, void, for they are clearly open to the objection which is best stated in a leading authority in the highest court of the land upon a similar question:

" 'They seem intended to confer, and actually do confer, not a discretion to the exercise upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. * * * The power given * * *

is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.' *Yink Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *People v. Mutual*, 38 Mich. 154; *City v. Great Southern, supra; State v. Finch*, 78 Minn. 118; 80 N. W. 856."

In *Los Angeles v. Water Co.*, 177 U. S. 558, 579, the court says:

"Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remembered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and we think, could legally be, exerted. As we have said, there was no concealment, no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel or of laches."

In *Ry. Co. v. Olathe*, 156 Fed. 624, the syllabus in part is as follows:

"A reservation in an ordinance granting a franchise to a street railway company, which by its acceptance by the company created a contract, of the power to repeal said ordinance in case of a breach of its conditions by the company, does not authorize the city to repeal the ordinances at its pleasure without assigning any breach, and when there has, in fact, been none."

In *Old Colony Trust Co. v. City of Atlanta*, 83 Fed. 39, on page 44 the court says:

"It is further insisted that the power to pass this ordinance exists by reason of the reservation made by the city in the ordinance authorizing the Atlanta Consolidated Street-Railway Company to use the streets and to electrically equip its lines. There is some difference between counsel as to the exact language of this ordinance, but, giving it the broadest meaning in favor of the city, it provided that the company should be 'subject to all the laws and ordinances now in force and such as may be hereafter made.' Of course, this ordinance should be treated as contended for by counsel for the consolidated company, and the word 'legally' should be read into it, and it should be read as though it said such ordinances 'as may be hereafter legally made'; and the question therefor recurs to, and is, what legislative grant has the city empowering it to pass this transfer ordinance? As we do not find in any of the acts of the legislature relied upon the power to pass the ordinance, we are compelled to hold that the city exceeded its authority in passing it. We hold, moreover, that, before the city can exercise the power to fix rates of fare for a street-railroad company, it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the state over the subject-matter need not be discussed. We are dealing with the power of a municipality, a creature of the legislature which derives all its authority from the legislature, and can only act within the limits of the legislative grant. If, under any of the acts of the legislature which have been discussed, it could be held that the city had the power, by necessary implication, to regulate or to fix rates of fare for street railroads, or for this particular company, it might be gravely questioned, even then, if it had the power to pass that part of the ordinance in question requiring transfers. It would be a subject of serious

> doubt, at least, if the authority to fix rates carried with it the authority to require the street-railway company to give two, three, or more rides for one fare. One continuous ride for a single fare is one thing, and two or more rides, with the necessary stoppage and letting passengers off and taking them on, is another and entirely different thing. Many reasons have been urged in argument, and others might be suggested, which in our opinion make a broad distinction between the two classes of service, namely, between a continuous ride in one car and a ride requiring transfers from one or more cars to others. Unquestionably this ordinance, as to its feature requiring transfers, is a very broad exercise of municipal power. It appears to go to the limit of municipal control even under legisative authority. The power to pass the ordinance should be clearly shown. On the contrary, it is clear to us that the city is without such power."

The above case is affirmed in *City of Atlanta v. Old Colony Trust Co.*, 88 Fed. 859.

In *Cleveland City Ry. Co. v. City of Cleveland*, 94 Fed. 396, the court of appeals quotes with approval the following language from *Smith v. Cincinnati*:

> "A general ordinance providing for the construction and operation of a street railway within the city limits, which provided that on the acceptance by the existing companies of the terms of the ordinance it shall thereupon be operative and binding as a contract between the city and the company so accepting the same, and that the street railroad shall be guided, governed, and regulated by the following conditions, and such lawful and reasonable restrictions as the council may thereafter pass, does not reserve to the council the right to

abridge or destroy any of the contract rights of the company, but only to make and enforce proper and reasonable regulations as to the operation or construction of the routes."

In *Commonwealth v. Warwick*, 185 Pa. St. 623, the court says:

"Where a city authorizes a telephone company to run and maintain its wires over and through the streets of the city upon the single condition that it shall comply with all the ordinances then existing, or thereafter passed, 'regulating or in any manner controlling telegraph or telephone companies in the use of the streets for telegraph and telephone purposes,' the determination of what streets shall be used is for the company, and after it has accepted the obligation and constructed its lines, the city cannot impose other conditions upon its grant of consent, but its authority thereafter is only that of regulation as to the manner of using the streets."

In *Baltimore, etc., Trust Co. v. Baltimore, etc.*, 64 Fed. 159, the court says:

"If a contract has been created by the ordinance, then the right to amend or repeal is such as was reserved to the city in the enactment itself. The only clause in Ordinance No. 23 providing for changes in or amendments to it is in the following words: 'AND SHALL BE SUBJECT TO ALL THE GENERAL REGULATIONS NOW EXISTING OR HEREAFTER TO BE MADE, RELATING TO CITY PASSENGER RAILWAYS NOT INCONSISTENT WITH THIS ORDINANCE.' I do not find the right to repeal in this reservation, but simply the right to regulate, provided that the regulations proposed are not inconsistent with the terms of the ordinance. The right to regulate will not be held to mean the right to repeal or materially

modify, or, in effect, to prohibit, the exercise of privileges previously granted by the state and city, or to impair the obligation of a contract or destroy vested rights."

In *Ry. Co. v. Joliet,* 79 Ill. 44, the court says:

"Some stress is laid upon a certain proviso in the ordinance of the common council, of January 3, 1853, before referred to, which is as follows: 'Provided, that said railroad company shall be subject to all laws and ordinances that may hereafter be passed to regulate railroads in the city.' That only means, that the company should be subject to all reasonable and legal ordinances for the *regulation* of the road. It had no such scope, that the railroad company should abandon or take up and remove its track at the bidding of the common council."

In *Africa v. Board of Mayor, etc., Knoxville,* 70 Fed. 729, the court says:

"The franchise of a street railway company to operate its road and use the streets of a city is derived from the legislature, through its charter, and not from the municipal corporation, though the consent of the latter be required to the exercise of its authority. Such franchise, upon acceptance by the company, becomes a contract, inviolable and irrevocable; and the consent of the municipality, when once given, cannot, in the absence of a statute authorizing its withdrawal, be withdrawn, either as to streets actually occupied or as to streets included within the general plan of the company's routes, which it intends in good faith to complete."

In *Citizens' Street R. Co. v. City of Memphis,* 53 Fed Rep. 715, the statute relied upon by the plaintiff gave it the right to construct, maintain and

operate street railways in the City of Memphis, "SUBJECT TO SUCH REASONABLE RULES AND REGULATIONS IN RESPECT THERETO AS THE COMMON council of the City of Memphis may from time to time by ordinance prescribe." The power thus reserved to the city was construed by the court as follows (p. 732):

> "The city has by its ancient and modern charters, to be sure, the right to regulate and control this use by the street car company of the city streets. The franchises were granted subject to that power. And this would have been so without any special grant of the power of regulation to the city, and that power, in its more plenary quality, entered into the charter contract with the company, and became a part of it. Under it the city may, by ordinance, possibly by contract, or both, and possibly without either—under mere police oversight, regulate and control this use of the street in a thousand ways, such as determining the kind of tracks, their location in the street, their connections, and the like; the running of the cars, and the like; the joint or simultaneous use by other street railway or transportation companies, and the like; the use by others, such as water and gas companies, at the same time; the relation of abutting owners to the use; and indeed, all matters falling reasonably within the police power of regulation and control. But regulation cannot be enlarged into a power of prohibition, nor under it can the city usurp the state power of creating franchises or taking them away."

New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18.

Citizens' St. Ry. Co. v. City Railway Co., 64 Fed. 647.

Appeal of City of Pittsburgh, 115 Pa. St. 4.

Atlantic City Water Works v. Water Co.,
44 N. J. Eq. 427.

THE RULE OF STRICT CONSTRUCTION DOES NOT APPLY AGAINST THE COMPANY AS TO SAID RESERVATION.

In *Cleveland Electric Ry. v. Cleveland and the Forest City Ry. Co.*, 204 U. S. 116, the Supreme Court uses this language:

> "Grants of franchises are usually prepared by those interested in them and submitted to the legislatures with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in nature, and contain no ambiguity in their terms, and will be strictly construed against the grantee." (See *Blair v. Chicago*, 201 U. S. 400).

The reason for the rule is that the grants are prepared by the grantee himself, or that the language is that of the grantee. Another rule is also well recognized and that is NO RULE OF LAW SHOULD EXTEND BEYOND THE REASON FOR IT, consequently this rule of strict interpretation should apply ONLY where it appears that the language of the grant is that of the grantee instead of the language of the grantor. Where it is plain that the language of the grantor is used the reason for the rule is absent, and the rule should not apply. In the ordinance of September 19, 1890, there are many provisions not the language of the grantee. For instance, Sec. 5 (Fol. 36, red.):

> "In case any other electric system preferable to the overhead wire system shall prove a practical success, the city council shall have the right to designate any existing line, operated by said street railway company as a line on which to experiment with said new electric motive system, and said company shall at once proceed to equip said line so designated with said new electric system; and, if after the same has been operated six months the city council deems it a PRACTICAL AND SUPERIOR POWER TO THE OVERHEAD WIRE SYSTEM, it shall have the right to order the entire existing street railway system, or any line or lines thereof, to be operated WITH SUCH NEW ELECTRIC MOTIVE POWER."

This is the language of the city. There is no reason why that should be strictly construed against the grantee. Likewise the provision of Section VIII (Fol. 38, rcd.) to the effect that the street railway shall be subject to "ALL OTHER ORDINANCES OF SAID CITY NOW IN FORCE OR HEREAFTER ADOPTED, SO FAR AS APPLICABLE," is the language of the city and should not be strictly construed against the grantee; but, on the other hand, should be strictly construed against the user of that language, viz., the city.

In 9 Cyc. 590, the author says:

> "It is a well settled rule of construction that words will be construed most strongly against the party who used them; the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

This ordinance is a contract, and the rules as to contracts apply. See *Detroit v. Detroit, etc., Ry.*, 184 U. S. 388, where the court, in discussing *Ry. v. Smith*, 128 U. S. 174, says:

> "It may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them, would be regarded as forming a contract because the statute provided specially for that mode of determining them." See p. —— above.

THIS CASE IS CONTROLLED BY THE DETROIT CASE AND THE LOS ANGELES WATER POWER CASE, AND CONTAINS THE ESSENTIAL FEATURE OF EACH OF THOSE CASES AND THE DETROIT CASE, 64 FED. 628.

It is apparent that this case in its essential features is almost identical to the *Detroit* case, 184 U. S. 368, and that it possesses in addition thereto the force and strength of the *Los Angeles* case, 177 U. S. 558. These cases have not been modified nor changed in any particular, but have been recognized in *Home Telephone Co. v. Los Angeles*, 211 U. S. 276 as still the existing law announced by the Supreme Court of the United States. The court there said:

> "The decisions of this court, upon which the appellant relies, where a contract of this kind

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was found and enforced all show unmistakably legislative authority to enter into the contract. In *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities.' The opinion of the court, after saying (p. 382) 'It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare,' pointed out (p. 386) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland v. Cleveland City Ry. Co.*, 194 U. S. 517, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as 'comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated.' In *Cleveland v. Cleveland Electric Ry.*, 201 U. S. 529, precisely the same authority appeared. In *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, the court said (p. 508): 'The grant of legislative power upon its face is unrestricted, and authorizes the 'city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.' Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed."

A CRITICISM OF SOME POINTS AND AUTHORITIES FOUND IN CITY'S BRIEF.

At page 33 of the brief counsel has given us the population of the State and the City of St. Paul at different times prior to 1870, and from this it is argued, at page 34, that the legislature did not have street railways in mind in the laws relative to incorporation. This argument would be equally applicable to the steam railroad of commerce. Street railways were not unknown to the inhabitants of the State. They came from the East, a large percentage of them, and they were not unmindful of the existence of street railways in other states. The Minneapolis Horse Railway Company was organized in 1867 (p. 130 Sup. Brief); The St. Paul Street Railroad Company came into existence in 1868 by chapter 6 of the special laws of that year. Section 1 thereof reads:

> "Sec. 1. George L. Becker * * * and their associates, successors and assigns be and they are hereby created a body corporate by name and style The St. Paul St. Railway Company * * * "

The legislature provided for the taxation of street railway property by chapter 1 of the laws of 1874, and, as already stated in our brief, street railroads came into existence in New York 23 years before the adoption of the articles by Appellee. History, therefore, seems to be rather against than in favor of counsel's contention that street railways were unknown. At pages 35 to 43 counsel has giv-

en certain provisions which he says repel the idea that Section 1 was intended to authorize the formation of corporations for street railway purposes. The argument made by counsel is apparently the same argument that was presented in New York for the purpose of showing that street railways could not incorporate under the General Railroad Act. Matter of U. S. A. & P. R. R. Co., 115 N. Y. 447, covers that proposition. Chapter 34 Revised Statutes 1866 came from three distinct acts. Chapter 55 of the General Laws of 1858 (see page 2 of the Supplement Brief), Chapter 70 of the General Laws of 1858 (see page 14 Supplemental Brief) and from chapter 6 G. L. 1865. It was the manifest intention of the legislature that all provisions should not be applicable to all companies found under Title I. Applying the same argument to chapter 58, Rev. Laws 1905, the present law on the subject of incorporations, we find that the provisions cited in the City's Brief embodied in the Revision of 1905, does not apply to all corporations formed thereunder. At page 71 of the Brief counsel cites chapter 350 Laws of 1899 as proof that street railway companies did not possess the power of eminent domain. The mere passage of chapter 350 of the laws of 1899 is not strong proof, if any at all, that this was not the law before that time. In *Lewis' Sutherland Statutory Construction*, p. 924, the author says:

> "The enactment of a law does not raise the presumption that it did not exist before. If it be an explicit provision on a given subject it does not of itself prove that the law was

different before; it may have been made in affirmance of the existing law and to remove doubts."

If the law of 1899 served any purpose whatever it was to remove a doubt as to the right, of a Street Railway Company whose lines extended into the country, to acquire private right of way for its lines outside of the city and outside of the streets and highways, but it did not in any manner affect or change or limit the power of such company to exercise the right of eminent domain for any other purpose necessary in the construction or operation of its lines in the city or elsewhere for purposes other than right of way which the necessities of its business might require.

In *Bingham v. Board of Supervisors,* 8 Minn. 411 (390) our court held it was not evidence. In *Thomas v. Hanson*, 59 Minn. 280, the same rule was applied. In *Spencer v. United States,* 169 Fed. 562 the court HELD that subsequent acts were some BUT NOT CONTROLLING evidence of the meaning of the prior law, citing many cases.

At page 103 of their brief counsel give us another discussion of chapter 350 of the General Laws of 1899. They say "that the legislature of the State in 1899, chapter 350, G. L. 1899 gave the street railway companies the limited right to exercise the power of eminent domain outside of cities. This is the first time such rights either inside or outside the city was recognized by statute."

And again counsel, at page 110 of the City's brief, cites from the *Suburban* case (101 Minnesota) at

page 150 thereof, apparently for the purpose of proving that the suburban company obtained its power of eminent domain from chapter 350 of the Laws of 1899. This error will be readily removed by reading a little more of the decision. It follows:

> "In Section 2593 (2592) G. S. 1894, street railways were not specifically mentioned; but the right of eminent domain was conferred upon such road outside of the cities and villages by chapter 350, p. 461, Laws 1899. THIS CHAPTER WAS EXPRESSLY REPEALED BY R. L. 1905; but the right to exercise the power was reserved to such companies by section 2841, where street railways are designated as works of internal improvement, and by section 2842 and section 2926, where the right of eminent domain is expressly conferred upon all such corporations."

Section 2593 G. S. 1894 reads:

> "Sec. 2593. Articles of incorporation—Filing and record.
>
> "They shall organize by adopting and signing articles of incorporation which shall be recorded in the office of the Register of Deeds of the county where the principal place of business is to be, and also in the office of the Secretary of State, in books kept for such purposes."

The court therefore cited the wrong section. It meant to cite Sec. 2592.

Sections 2841 and 2842 of the Revised Laws of 1905, referred to by the court above, were not new provisions, but were both of them re-enactments of the provisions of Section 2592 of the General Statutes of 1894 (p. 86, Sup. Brief). They conferred

no new right of condemnation upon any corporation, but reserved the rights which had been granted previously by sections of the general statutes of 1894 which they re-enacted, and in the same case of *Minneapolis & St. Paul Suburban Railway Company, v. Manitou Forest Syndicate,* 101 Minn., on page 144 the court says:

> "If appellant (The Suburban Co.) was in fact incorporated for the construction, maintenance and operation of a work of INTERNAL IMPROVEMENT, as provided by Title I, then it POSSESSED THE POWER OF EMINENT DOMAIN unless otherwise restricted."

The words "work or works of internal improvement" are inclusive. Railways, telegraph lines, canals, etc., are simply EXAMPLES of the works of internal improvement provided for in Section 1, of Title I of Chapter 34, and for that reason street railways and telegraph companies need not necessarily be named. Section 495, p. 924 *Lewis' Sutherland Statutory Construction.*

We have in our main brief discussed the similarity between street railways and telephones, and the argument in favor of the power of condemnation for telephone companies is equally applicable to street railway companies which find it necessary to exercise such power either inside or outside the city. There can be no question about this as we believe we have proved that the Minneapolis Street Railway Company had the right to build a railroad to Lake Harriet. This point was outside of the city limits of Minneapolis until 1881.

That the Minneapolis Street Railway Company had the right to condemn a crossing over the Milwaukee Road which would intersect it at a point outside of the city before reaching Lake Harriet in case the Milwaukee Railway Company objected to the crossing seems established beyond a doubt by the decision in *Northwestern Telephone Company v. Milwaukee Railroad Company*, 76 Minn. 334, and other cases cited. In the *Suburban* case the action was begun after 1905. Chapter 350 of the law of 1899 was repealed at that time, and was not re-enacted in Revised Laws of 1905, and unless re-enacted in the Revision it could not exist and at page 132 the court says "that the Suburban Company had the right to condemn by virtue of Section 2592," Genl. St. 1894, and that necessarily excludes the theory that the power of condemnation was received from chapter 350 of the laws of 1899. It is only that part of the prior law which was re-enacted which continues. That part which was omitted was repealed. Section 5511, R. L. 1905, provides:

> "551. Whenever a statute enacted after the Revision Laws become operative, by its title purports to be a revision of all laws upon a particular subject, or of a particular chapter therein specified, or whenever such statute does, in fact, cover the entire subject matter of a former law, even if such statute contains no repealing clause, or only a general clause repealing laws inconsistent therewith, it shall be construed as repealing all former laws upon the same subject, OR OF ALL OF THE CHAPTER REFERRED TO NOT SPECIFICALLY RETAINED."

As to chapter 350, Laws of 1899, Section 5517 provides:

> "The several laws hereinafter enumerated shall be expressly repealed from and after taking effect of the Revised Laws" (and Chap. 350, G. L. 1899, was one of the laws enumerated).

At page 29 of the brief counsel lays great stress upon the language used by the court in *State v. Duluth Street Railway and others*, 76 Minn. 96, in support of his claim that the word "railroad" never means "street railways." The decision in that case was based upon the practical construction put by the parties and by the State officers upon the taxing law ever since 1874.

In *State v. Duluth Street Railway Company*, 76 Minn. 96-106, the court says:

> "Assuming, without deciding, the validity of this act, it applies only to what are usually known as ordinary commercial railways, and, not to street railways. THIS IS THE PRACTICAL CONSTRUCTION WHICH HAS BEEN PLACED ON THIS STATUTE BY BOTH THE STATE AND THE STREET RAILWAY COMPANIES."

The force and authority of this decision comes from the *Funk* case, 61 Minn. 435. We have effectually shown that the *Funk* case is not authority to the extent claimed by the city. It does not prove that the word "railroad" does not sometimes include "street railways."

As already suggested, it was the practical construction which had been given to Chapter 1 of the

General Laws of 1874, from the time of its enactment until the decision in the case of *State v. Duluth Street Railway Company*, made in 1899, which controlled the decision in that case and induced the court to adopt the view that the Street Railway properties should be taxed upon an *ad valorem* basis. Applying the same rule of practical construction to the law providing for the incorporation of street railway companies it would determine the proper place for the incorporation thereof to be under Title I and not under Title II of Chapter 34, of the Revised Statutes of 1866.

After a careful review and consideration of the questions involved in this case we feel confident that this court must conclude that the decision of the court below in this case was correct and that the decree appealed from should be affirmed.

N. M. THYGESON,
Solicitor for Appellee.

M. B. KOON,
Of counsel for Appellee.

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SUPREME COURT, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 46.

THE CITY OF MINNEAPOLIS, APPELLANT,

vs.

THE MINNEAPOLIS STREET RAILWAY COMPANY,
APPELLEE.

APPELLEE'S BRIEF IN ANSWER TO APPELLANT'S SECOND BRIEF.

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Counsel for the city, in the second brief which they have prepared, in addition to re-asserting most of the claims made in their first brief, make certain statements which we deem it necessary to refer to and have prepared this short brief for that purpose. On page 22 of the city's second brief, counsel say, in reference to the ratifying act of 1879 that—

> "The very most that can be claimed for that act is that it supplied the power of contract, which power to that time the city lacked. * * * It will be noticed that counsel do not attempt to point out in what respect or by what method any defects are cured."

Counsel for the city either do not grasp the effect of this ratifying act or do not understand our claim under it. In order to make this clear we wish to re-state our position on

this question. The ratifying act of 1879 ratifies and makes valid every feature of the ordinance and contract of July 9, 1875. When that ordinance was passed the company had already filed its articles of incorporation with the Secretary of State, and had, so far as was possible, incorporated for a term of fifty years, that being the time specified in the company's articles of incorporation.

As the Supreme Court of Minnesota said in City of Duluth *v.* Duluth Gas & Water Power, 45 Minn., 210, speaking of the knowledge necessarily imputed to a city council in passing an ordinance granting a franchise to a corporation:

> "THE COUNCIL MUST BE HELD, WHEN DEALING WITH DEFENDANTS, TO HAVE KNOWN ITS CHARACTER, ITS PURPOSES, AND POWERS AS DISCLOSED BY ITS ARTICLES OF INCORPORATION."

Therefore, when the City Council of the city of Minneapolis, passed the ordinance of July 9, 1875, it referred to the period named in the company's charter then on file with the Secretary of State for the purpose of fixing the period or duration of the grant it was then about to make, and stated in perfectly plain language that the company was granted "DURING THE TERM OF ITS CHARTER" the rights and privileges named in the ordinance. The legislature in 1879 passed the ratifying act, which not only legalized and validated the action of the city in passing the ordinance, but also provided that—

> 2. "THE SAID RIGHT TO CONSTRUCT AND MAINTAIN SAID STREET RAILWAY THROUGH THE STREETS OF SAID CITY WITH THE RIGHTS AND PRIVILEGES AS SET FORTH AND QUALIFIED IN SAID ORDINANCE IS HEREBY LEGALIZED AND GRANTED TO SAID COMPANY."

This made valid the grant and contract for and during the same specific period. What period is that? It is the period and time named in the articles of incorporation of the company then on file with the Secretary of State, to

wit, fifty years, for it specifically says that the right to *construct and maintain* said street railways, as *set forth in said ordinance,* is hereby legalized and granted to said company.

How was it possible to more effectually ratify and confirm and make a contract to construct and maintain a street railway system for a definite period than is here done? The city had attempted to make a contract for a definite period; the legislature was ratifying and confirming that contract for that time; that time was specifically named in the articles of incorporation, then a part of the public records of the State, and there can be no question but what the legislature as well as the City Council understood and intended to make the period of that contract the FIFTY years named in the charter of the company, as they both referred to the time stated in the charter as the time during which the grant should be enjoyed. Counsel for the city say that the only effect of this act is to authorize the city to make the contract and that it does not authorize the company to accept the contract during the time the city is authorized to make it. This is equivalent to saying that an act which authorizes "A" to make a certain contract with "B," for a certain time, upon certain terms, does not authorize "B" to enter into the contract with "A" upon those terms. It is only necessary to state such a proposition in order to demonstrate its utter absurdity. When the legislature ratified the contract made by the city in 1875 it at the same time ratified and authorized the company to accept the contract for the time named in the ordinance, which was the fifty-year period specified in the company's charter. Where parties making a contract refer to some other instrument as fixing the term or a description, that instrument when identified becomes as much a part of the contract, so far as such time or description is concerned, as though it were specifically embodied in the contract. Thus if "A" sells "B" a lot described as lot one in block one, according to a plat then

on file in a public office, it makes no difference whether that plat is legal or illegal. "B" gets what property is embraced within the lines of lot one, block one, as marked out on that plat, regardless of the validity of the plat. It is equally true that when the city granted to the company the right to construct and maintain a street railway system during the time named in the company's charter, then on file in the office of the Secretary of State, and the legislature ratified and confirmed that contract and granted to the company the right to construct and maintain its street railway system as set forth in said ordinance, it vested in the company the rights named in that contract or ordinance during the fifty-year period named in its articles of incorporation, regardless of whether the company was authorized to incorporate for that period or not. As already stated in our brief we believe that this ratifying act fully and completely ends all question as to the incorporation of the company. Under the decisions of the Supreme Court of Minnesotate the legislature had full constitutional power and authority to extend the corporate period of an existing corporation or to grant to an existing corporation by special act rights, franchises, and privileges notwithstanding the constitutional provision prohibiting the creation of corporations by special act. See:

Green *v.* Knife Falls Boom Co., 25 Minn., 155.
Ames *v.* Lake Superior, etc. Co., 21 Minn., 241.
First Div. St. P. & P. Ry. *v.* Parcher, 14 Minn., 297.

In Citizens Water Co. of Bridgeport *v.* Bridgeport Hydraulic Co., 55 Conn., 1, the syllabus in part reads:

> "If the common council had no power to grant the exclusive use of the streets, yet, as the charter of the defendant company recognized and confirmed the grant by the city, it became as effective as if the city had had the power to make it and as if the legislature had made it in the most direct and explicit words."

In State *ex rel.* St. Paul *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn., 388, the court says:

> "The obligation was enforced by the city of Minneapolis in the case of the State *v.* Minneapolis & St. Louis Ry. Co., 39 Minn., 219, without special statutory authority, the obligation existing, as it is contended it does in the case at bar, by force of the provisions of the charter of the railroad company."

In Almand *v.* Atlanta Consolidated Street Ry. Co., 108 Georgia, 417, the court says:

> "When a street railway company has power under its charter to lay its track along the streets of a city, the city authorities may consent to such use of the streets by the street railway company, although there may be no express power in the charter of the city authorizing it to grant such a privilege."

In Clark *v.* Janesville, 10 Wis., 130, the court says:

> "I concede that the provisions of the company charter do not authorize it to receive subscriptions of this kind. But the power is clearly given by the charter of Janesville. It is a well settled principle, that a grant of power carries with it, as incidental, everything necessary to its execution. Can it make any difference whether the thing necessary, implies an additional capacity in the one executing the grant, or in the one with whom, or the subject upon which it is to be executed? I think not. It is a question simply as to the intent of the legislature. They grant the city power to subscribe for the stock of the company, and give its bonds in payment. Did they intend that the company should have power to receive the subscription and issue the stock for the bonds? No one would seriously assert the contrary. Have they then employed the necessary language to show this intent? I think so, clearly, in the granting the power to the city to give the bonds for the stock. This carries with it, by irresistible implication, the power to the company to give the stock for

> the bonds, and it would have been an idle repetition to have said it should have the power.
>
> "Suppose a law authorizing the issue of bonds by the State and providing that the governor might negotiate them by endorsement; would it be necessary to say that they should be negotiable? Suppose a license is required for marriage. If a license says A may intermarry with B, is it also necessary to say that B may intermarry with A? When these shall be held necessary, then I shall think, that under a law authorizing a city to subscribe for the stock of a railroad company and deliver its bonds in payment, the company has no authority to receive the subscription or the bonds, but not till then."

In the Matter of the Application of Prospect Park & Coney Island R. R. to Acquire Title to Lands, etc., 67 N. Y., 371, the syllabus in part reads:

> "Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute."

In Blair *v.* City of Chicago, 201 U. S., 455, the court says:

> "It thereby recognized the power of the common council to pass that ordinance. * * * The legislature by thereby confirming and recognizing the passage of the ordinance of August 16, 1858, also recognized the power of the common council to pass that ordinance under clause 9, sec. 4, of chapter 4, of the charter of 1851. In the act of 1859 the legislature did not assume to fix independently the term for the use of the streets but affirmed that which the common council had authorized the corporators to do and gave authority to confer future rights by agreement with the corporations. * * * If this ordinance had been without legislative authority previous to the act of February 14, 1859, that act constituted the persons named in the ordinance of 1858 with one other and their successors a body politic and corporate under the name of Chicago City Rail-

> way Company, for the term of twenty-five years, with all the powers incident to such corporation."

In Robertson *v.* City of Rockford, 21 Ill., 451, the syllabus in part is:

> "Municipal corporations are at the control of the legislature, and their charters may be enlarged or diminished, by an act incorporating a railway company."

On page 458 the court says:

> "This, as are all such municipal corporations, is dependent upon the legislative will for their existence as well as all power exercised by them, and their corporate powers may be increased or contracted by the legislature, at will. And the enlargement of this power may be given, by an act not professing, in terms, to amend their charter, but may be as effectually done, IN AN ACT INCORPORATING A RAILROAD COMPANY. This provision contained in the railroad charter is the last expressed will of the legislature, and must be held to be binding."

If the court should have any doubt on this proposition then it is certain that the legislative, judicial, and practical construction placed upon title I, of chapter 34, and which is fully discussed in our first brief, demonstrates that the company was not only authorized but actually REQUIRED to incorporate thereunder.

As already stated in our brief the city has repeatedly construed this contract as still in force since 1903, the time it now claims the contract expired. This CONSTRUCTION BY THE PARTIES should be given great weight.

In Sheldon *v.* Chicago, 9 Wall., 50-54, the court HELD as to practical construction of contract by the parties:

> "What adds great weight to this view is that it accords with the practical construction given to the contract by the parties. It was entered into, as we have seen, on the 23d day of May, 1859. Several of

these special assessments were authorized subsequently by the common council and collected, but no attempt was made to assess the railroad property of the company nor was any question raised as to its exemption till 1866, and not then by the city, but by some of the proprietors of lots fronting on the streets. In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to GREAT if not CONTROLLING influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, or beyond amicable adjustment, it can be settled only by arbitrament of the law. But in an executory contract, and where its execution necessarily involves a PRACTICAL CONSTRUCTION if the minds of both parties concur there can be no danger in the adoption of it by the court as the true one."

Topliff *v.* Topliff, 122 U. S., 131.
Knox County *v.* 9th Nat. Bank, 147 U. S., 100.
Thomas *v.* Cincinnati, etc. Coal, 81 Fed., 919.
St. Joseph Union Depot Co. *v.* C. R. I. & P., 89 Fed., 657.
District of Columbia *v.* Gallaher, 124 U. S., 505.
Steinbach *v.* Steinbach, 11 Wall., 567.

Counsel for the City, at the bottom of page 105 of their brief, refer to the case of Milwaukee Light, Heat & Traction Co. *v.* Milwaukee Northern Railway Co., 112 N. W. Rep., p. 663, decided June 20, 1907, and construct from it an elaborate argument, attempting to show the similarity between the Wisconsin and Minnesota Statutes, and to demonstrate therefrom that the power to exercise the right of eminent domain has never been conferred upon street railway companies either in Wisconsin or Minnesota, prefaced with the statement that "the opinion is too long to permit of its incorporation into this brief," so that they must content themselves with summarizing the points decided.

A careful examination of that case will disclose, we think, the reason why the opinion was not incorporated in the brief, for had it been, or had it been carefully read by counsel, certainly the statements made in their brief in regard to it and to the law in Wisconsin would not have been made.

It is true that prior to 1872 chapter 73 of the Revised Statutes of 1858 was the only legislative authority in the State of Wisconsin for the organization of corporations, and that statute provided, as the court in its opinion says, on page 666:

> "generally for the formation of joint stock companies, with the powers of corporations, for the purpose of carrying on any kind of manufacturing, mechanical, mining or quarrying business, or any other lawful business, by the adoption of articles of agreement in writing. It is perhaps possible that some transportation companies may have been organized under this law, but the general, if not the universal custom was to procure a special charter from the legislature for the incorporation of either a general commercial railroad or a street railroad. Companies so formed were controlled by general regulations contained in chapter 76, Taylor's Statutes 1871, and street railroads were authorized to accept municipal franchises and extend their lines into adjoining towns."

The foregoing quotation entire is taken from the opinion of the court. The constitutional amendment prohibiting special laws, granting corporate powers and privileges except to cities, was adopted in 1871, and the court, on page 667, says:

> "In 1872 general laws providing for the organization of corporations by the making and filing of articles of association were passed. Of these General Laws, chapter 119 provided for the formation of general commercial railroad corporations, with rights of eminent domain, and regulated their operations; but the formation of street railroad corporations was not authorized thereunder."

The court then refers to several other provisions regarding incorporations, and says, on the same page:

> "None of these laws contain any provisions for the organization of street railroad corporations, but the provisions of chapter 313, p. 302, of the Laws of 1860, remained in force. Thus the law stood until the passage of the Revised Statutes of 1878, with apparently no means provided for the organization of street railroad corporations."

Chapter 313 of the Laws of 1860, referred to, is the statute which authorized street railroads to accept municipal franchises and extend their lines into adjoining towns. The court further says:

> "By the last-named revision (1878), chapters 144 and 146 of the Laws of 1872 were condensed and united, forming chapter 86; it being provided, however, that corporations for the purpose of engaging in banking, insurance, building or operating railroads or plank or turnpike roads could not be formed thereunder. Chapter 119 of the Laws of 1872 became, with some changes, chapter 17 of the Revision, and still remained a chapter authorizing the formation of general commercial railroads only, the provisions of chapter 313, p. 302 of the Laws of 1860, being added at the close of the chapter as sections 1862 and 1863. It was evidently observed, however, that the existing statutes were barren of any provision for the organization of street railroad corporations, and the following new sentence was inserted at the beginning of section 1862: 'Corporations for constructing, maintaining and operating street railways may be formed under chapter 86, and shall have powers and be governed accordingly.' At this time, then, the law stood thus: General commercial railroads with the power of eminent domain could be formed under chapter 87, while street railroad companies without the power of eminent domain, but with the power to accept franchises from a municipal corporation to operate the cars upon the streets, and with the consent of the supervisors to operate them

> upon the highways of adjoining towns, might be formed under the provisions of chapter 86, as modified by section 1862."

The court then goes on to say that the legislation at that time contained no provisions under which an interurban railroad corporation carrying passengers and freight through the country from city to city could be formed, nor did it contain any provisions by which a street railroad company could enlarge the scope of its business so as to perform these functions, and that therefore, by chapter 221 of the Laws of 1880, an amendment was made, providing in substance that a street railroad company operating within any municipal corporation might, with the consent of the supervisors of any adjoining town, extend its lines into such town and use the highways thereof, provided it should not obstruct common travel of the public thereon, and hold that these provisions provide in effect for a different class of railways, namely, suburban or electric railways.

On page 668 the court refers in its opinion to the case of Chicago & N. W. R. Co. *v.* M. R. & K. Elec. R. Co., 95 Wis., 561, and states the questions involved in that case, and then in the opinion says:

> "This case was argued February 27, 1897, but not decided until April 7, 1897. Its pendency had, however, called sharp attention to the fact that no railroad corporations, except those organized for general commercial purposes under chapter 87, possessed the power to condemn lands, and that without such power both street railways and interurban railways might be seriously handicapped, if not crippled, in their operations. To meet this difficulty, it was concluded that limited powers of condemnation should be given them, and to that end chapter 175, page 290 of the Laws of 1897 was passed. This act provides that any street railroad corporation or any electric railroad corporation may, by purchase, grant or condemnation, acquire lands and other property necessary for the construction and operation of its railroad,

within certain limitations, and applied the railroad condemnation statutes to such corporations. The wording of this act, both in its title and in its body, so clearly recognizes the existence of two kinds of corporations, the street railroad corporation and the electric railroad corporation, that any serious doubt as to the legislative understanding of the subject seems to be removed. This statute was soon thereafter embodied in the Statutes of 1898 as section 1863*a*, and was abbreviated in its wording so as to confer the power of condemnation on any street or electric railroad corporation, but there is no indication of any intention to make any change in the meaning by this striking out of words. It was evidently thought that the same meaning was expressed in fewer words. This section was subsequently amended so as to grant more complete powers of condemnation by chapter 306, page 537 of the Laws of 1899, and chapter 465, page 686 of the Laws of 1901, and chapters 266 and 497 of the Laws of 1905."

And a reference to those laws shows that chapter 306 of the Laws of 1899, among other things, provides as follows:

"SEC. 1863*a*. Any street or electric railway corporation may acquire, by purchase, grant or condemnation, or hold or use such real estate or other property as may be necessary for the construction, maintenance and operation of its railroad, and of the stations, depot grounds and other accommodation reasonably necessary to accomplish the objects of its incorporation. All the provisions of subdivision 6 of section 1828 of these statutes relative to railroad crossings shall apply to street and electric railways. * * * All the provisions of these statutes relating to the exercise of eminent domain by railroad companies shall apply to street and electric railroad corporations; provided, that nothing herein shall apply to any street, alley, viaduct, park or boulevard in any city or village."

And chapter 465 of the Laws of 1901 is entitled, "Proceedings for condemnation by street railways, as to crossings,"

and provides more in detail the method of obtaining the right to make such crossings, section 1 of which act concludes with the following words:

> "All the provisions of these statutes relating to the exercise of eminent domain by railroad companies shall apply to street and electric railroad corporations; provided that nothing herein shall apply to any park or boulevard in any city or village, nor to any street, alley or viaduct therein, unless the use of such street, alley or viaduct shall first be granted to such street or electric railway company by a franchise duly passed by the board of trustees or common council of such village or city; and provided further that nothing herein shall apply to the right of the public or the title of any city or village, in and to any street, alley or viaduct within its limits."

And by the laws referred to in the opinion, chapters 266 and 497 of the Laws of 1905, the power to exercise the right of eminent domain by street railways, and by electric or suburban railways, is extended somewhat, but in no material respect. Speaking of these statutes the court, on page 668, says:

> "It is common knowledge that the interurban railways which have been built in this State are all operated by electricity, and that they are popularly called 'electric railroads.' The legislature has evidently adopted this popular name, and has used it since 1897 to designate the rural or interurban railroad. One exception to this use may be noted, and that is in chapter 347, page 556, of the Laws of 1903, which authorizes 'any street or interurban railway company' located in one of the border counties to consolidate with a like corporation in an adjoining county of the adjoining State. Here the recognition of an interurban railway company, as distinct and separate from a street railway company, is so manifest as to require no discussion of the subject. It is true that some recent statutes have not accurately preserved the distinction. In one of the clauses of chapter 497, page 912, of the Laws of 1905, the words 'electric railway'

> are used alone, evidently intending to cover both street and interurban roads, and in chapter 447, page 772, of the Laws of 1905, requiring the production of books and papers by the officers of railroad corporations, only railroad and street railroad corporations are named, though it is manifest that all railway corporations were intended to be included. So, also, in some of the decisions of this court, the term 'street railway' is inaccurately used as if it covered the interurban railroad. Such inaccuracies, however, can have little weight in the face of the definite statutory provisions already referred to creating and recognizing the interurban or electric railroad."

It will appear, therefore, that the statement made by counsel, on page 108 of their brief, that "it therefore conclusively appears that street railways have never fallen under the designation of 'railways' or 'railroads,' nor had the power and privileges of railways," and that "only commercial railways and suburban or interurban or rural railways have ever been invested with the power of eminent domain in Wisconsin," is inaccurate and not warranted by the facts stated in the foregoing opinion, any more than is the following statement, made in their brief on the same page and directly in connection with the foregoing, "It may be added that there is not to be found in the decisions of Minnesota a single suggestion that street railways have ever been invested with the general power of eminent domain," overlooking entirely the statement of the Supreme Court of Minnesota in Minn. Canal & Power Co. *v.* Pratt, 101 Minn., 214, as follows:

> "Railway corporations were recognized as public-service corporations, and granted the right of eminent domain in this and other States, long before there were any statutes to regulate the conduct of their business or to fix the rates which they might charge. Street car companies, telegraph and telephone companies, and gas and electric light companies were recognized as public-service corporations and given the power of eminent domain under similar conditions. All such corporations are nevertheless public-

> service corporations, and because of the nature of the business in which they are engaged and the fact that they have been granted the power of eminent domain, are subject to reasonable State and municipal control whenever circumstances arise which require such control."

Equally inaccurate and unjustified by the facts are the statements made on pages 119 and 120 of counsel's brief, to the effect that "the right of eminent domain is denied to street railways in Wisconsin," and "that, in the case referred to, it is assumed all the way through that street railways as such have never been invested with the power of eminent domain, while railroads and suburban or rural railroads have been invested with such power," the fact being, as appears clearly from a careful reading of the decision above referred to and an examination of the statutes, that the only law granting power to exercise the right of eminent domain by electric, rural, or interurban railway companies applied equally, and in every respect, and to the same extent to street railway companies.

II.

Counsel for the City in their second brief assert, with much emphasis, that certain allegations in the city's answer stand as admitted facts in the case, notably, the allegation to the effect that the city has always claimed the right and authority to fix and regulate the rate of fare this company may charge at such amount as it deems best, and that because this case was submitted on bill and answer this allegation of the city's answer must be taken as an undisputed fact.

To start with, this is merely an allegation of a conclusion of law and not an allegation of an existing fact.

It is true that the city now claims that it has such power and authority by reason of section 8 of the ordinance of September 19, 1890. This is the ultimate conclusion to be determined by this court in this lawsuit. and any allegations

which the city may have made regarding its right and authority to fix and regulate the company's rates without the company's consent must be determined from the ordinances themselves, and such determination is necessarily a legal conclusion. The mere allegation of what the city CLAIMS it has the power to do cannot be an allegation of a fact, and in the absence of a denial of such claim cannot make the claim itself an existing fact. The City can only act through its common council by ordinance or resolution. There is no reference in the answer to any ordinance or resolution on the part of the city during the past fifteen years wherein the city has ever attempted to or has asserted the right to regulate or fix the fares of the company, and in the absence of any such ordinance or resolution asserting the city's claim of such right or power necessarily nullifies any conclusion which counsel may allege on that subject. The city has no power or authority to assert any claim or right excepting as it discloses such claim or right by legislative action through ordinance or resolution of its common council.

III.

Counsel for the City, in their second brief, at page 87, state that the judgment or decree conclusively determines that the appellee is entitled to charge five cents for each passenger for each continuous ride of not exceeding three miles in length. This assertion on the part of counsel is as unjustified and unfair as the assertions made in their first brief referred to in this connection on page 86 of their second brief. The judgment and decree is based upon the ordinance of July 9, 1875, as *modified by the motive power ordinance* requiring the issuance of transfers, and the transfer provisions therein contained, all of which are fully set forth in the company's amended bill, and admitted by the city in its answer.

At folio 40 of the record the company alleges in its amended bill that section 8 of the ordinance of 1875 is amended and modified by the transfer provision of the mo-

tive power ordinances which are there specifically referred to. When the company accepted the motive power ordinances containing these transfer provisions, section 8 of the ordinance of 1875 was thus changed or modified, and has ever since stood as though the transfer provision had originally been incorporated into the ordinance of 1875; and the judgment and decree is necessarily based upon said ordinance of 1875 as so modified and amended. When the decree states that the company is authorized to charge and collect five cents for each passenger riding on its cars, as provided in section 8 of the ordinance of 1875, it can only be taken to mean as amended or modified by said transfer provisions so set forth in the amended bill. It seems hardly necessary to call the court's attention to a matter of this kind; but counsel for the city have made such emphatic, and as it seems to us unjustifiable, assertions to the contrary that we have taken the liberty of calling the court's attention to the self-evident facts which show the incorrectness of such assertions.

Counsel for the City, at page 15 of their second brief, quote from the Suburban case at pages 145 and 146, and at page 16 counsel say:

> "And yet the court here holds, in effect and by necessary implication, that a street railway company pure and simple could be properly organized under Title II."

The claim that this Suburban decision is authority on the proposition that a corporation to operate a street railway can organize under Title II is frequently reiterated by counsel for the city. In order that this decision may be better understood, we wish to point out the questions involved in that case.

The Suburban Company has filed articles of incorporation (see page 115 of our supplemental brief, and 101 Minn., pages 142 and 143 of the Suburban decision), stating that

the general nature of its business was to build, own and operate suburban street railways extending from the city limits of the cities of St. Paul and Minneapolis to and into outlying cities, towns and villages within the state of Minnesota, the following being among the lines of street railway which this corporation shall have the right to either build or acquire by purchase or lease, and to own, operate and maintain after such building or acquisition. Then follows a description of four separate lines of railway which the Suburban Company proposed to construct. As shown by the map attached to the supplemental brief, the Suburban Railway Company operates from the city of Minneapolis through the village of Hopkins, the village of Excelsior, and through the village of Tonka Bay, each being a municipality under the law of the state of Minnesota. The Minneapolis and St. Louis Railway Company had a line of railroad extending from the city of Minneapolis in a westerly direction through the villages of Hopkins, Excelsior and into the village of Tonka Bay. The Suburban Railway Company proposed to construct a railway which crossed the Minneapolis and St. Louis Railway Company's right of way within the village of Tonka Bay. The Manitou Forest Syndicate and the L. S. Gillette Company owned private property within the boundaries of the village of Tonka Bay deemed necessary for a right of way for the Suburban Railway Company. The Suburban Railway Company sought to condemn the right to cross this private property and also to cross the right of way of the Minneapolis and St. Louis Railway Company. The right of the Suburban Company to condemn this property within the village of Tonka Bay was contested on two grounds: first, that the Suburban Railway Company had filed its articles under Title II of Chapter 34, and in the certificate specifically so stated. It was contended that because the Suburban Railway Company was organized under Title II, since there was no provision for condemnation under that title, the Suburban Company could not condemn.

Second, it was claimed that the Suburban Railway Company was not a railroad, but simply and solely a street railway company, and prohibited for that reason from condemning within the boundaries of a village by section 2842, R. L., 1905, wherein this proviso appears:

> "Provided that no street railway company shall have or exercise such right (namely, the right of condemnation) within the limits of any city or village."

The issue to be decided by the court was thus stated at page 142 of the decision:

> "As we understand the order, the learned judges of the trial court were of opinion that appellant company was a street railway company, strictly speaking, and for that reason did not, under our statutes, possess the right to exercise the power of eminent domain within the limits of cities and villages. The solution of that question calls for a consideration of two propositions: First, as originally incorporated, was the company endowed with the right of eminent domain? Second, if it was, then was the power to exercise it within the limits of cities and villages denied by subsequent statutes?" (sec. 2842, Revised Laws, 1905.)

The Suburban Company was organized in June, 1899 (page 142, suburban decision). Section 2592, General Statutes, 1894, as it stood at the time of the incorporation of the Suburban Company, may be found at page 144 of the suburban decision. After setting out this section of the statutes of 1894, the court said:

> "If appellant was in fact incorporated for the construction, maintenance, and operation of a work of internal improvement, as provided by Title I, then it possessed the right of eminent domain, unless otherwise restricted" (by section 2842, Revised Laws, 1905).

The court analyzes the articles of incorporation, and at page 145, says:

> "Although the articles state that it is the purpose of the company to purchase, lease, build, own, and operate street railways, the word 'street' is not significant, because the context shows that the articles do not refer to that class of railways." (The word 'railways' seems here to be used in the broad sense of including street railways.) "The railways" (the word again is used in its broad significance) "described in the articles are suburban railways, extending from the city limits of St. Paul and Minneapolis to and into outlying cities, towns, and villages within the State of Minnesota," etc.

At page 146 the court says:

> "The proposed railways" (namely, those extending outside of the city limits) "are to run from the limits of the cities to distant cities and villages, through land where there are no streets; and hence the word 'street' was not used in the articles for the purpose of limiting the corporation to the provisions of Title II."

The court was talking solely with reference to articles of incorporation providing for lines operated beyond the city limits, although it appeared that these same lines did run through three villages, namely, the villages of Hopkins, Excelsior, and Tonka Bay.

The prohibition upon condemnation found in section 2842 is that no street railway company shall have or exercise such right within the limits of any city or village. There was no question before the court as to where street railways which are wholly confined within the boundaries of a city should organize. There is no statement in this decision, and no inference that can properly be drawn from any statement in the decision, that corporations to operate street railways cannot be organized under Title I, nor is there any statement in this decision which can by inference be construed as an

authority that a corporation to construct and operate street railways must of necessity organize under Title II, because that question was not involved in the decision.

Counsel seeks to construe the language at page 146: "hence the word 'street' was not used in the articles for the purpose of limiting the corporation to the provisions of Title II," as a declaration by the court that a corporation to operate the ordinary street railway should organize under Title II, while, as a matter of fact, that is simply a statement by the court to the effect that the claim of the Minneapolis & St. Louis Railway Company and the Manitou Forest Syndicate were wrong when they claimed that the Suburban Company belonged under Title II. This case was tried after the Revised Laws, 1905, went into effect, and the power of the Suburban Company to condemn was granted by section 2592 of the General Statutes, 1904, and was continued in section 2841 of the Revised Laws, 1905 (see page 132 of the decision), unless such power had been taken away by the proviso in section 2842. At page 150 the court uses this significant language:

> "These provisions for the exercise of the right of eminent domain by street railways without the limits of cities and villages do not warrant the inference that it was the intention to withhold the right from corporations operating in the country lines of the street railway type."

Stripped of its verbiage, the articles of incorporation of the Minneapolis & St. Paul Suburban Railway Company, so far as relates to railways outside of the city of Minneapolis, and so far as relates to the suburban districts or districts adjoining the boundary of the city of Minneapolis, in no essential differ from the articles of the Minneapolis Street Railway Company. The articles of the Minneapolis Street Railway Company provide that that company is authorized to operate railways in the streets and highways of the city of Minneapolis and its suburbs within Hennepin county. Whether we construe that authorization as construed by

counsel for the city, confining the railway company to the streets and highways within the suburbs as well as within the city, or whether we construe it as the word seems to indicate that it should be construed, authorizing the building of railways in the streets and highways of the city and in the suburbs, irrespective of and disregarding the streets and highways, the need of the power of eminent domain is equally applicable, and the doctrine of the suburban case applies to that part of the system of street railways authorized to be constructed outside of the boundaries of the city of Minneapolis. If not confined to the streets and highways, then it is patent that it must, in order to carry out its purpose, have the power to condemn private property. If it is confined to highways in the suburbs, it would be equally compelled to exercise the power of eminent domain in the event that any obstruction in the highway prevents the operation of the railroad. If a grade in the street is of such a character that it is not able to ascend the grade, it would be necessary to condemn private property in order to avoid the obstruction. If it crossed a railroad, it would have to condemn the railroad right of way in order to extend the line. In either event the company, in order to carry out its purpose, must exercise the power of eminent domain.

In addition to the authorities quoted in our original brief on this propositon, we call the court's attention to note 22, section 393, Lewis' Eminent Domain, second edition:

> "Harvey *v.* Aurora, etc., R. R. Co., 174 Ill., 295, 51 N. E., 163. The court says: 'If, in the construction of the road in the highway, difficulties or obstructions were encountered which rendered it impracticable to construct the road in the highway, a necessity might arise, within the meaning of the law, which would authorize the company to leave the highway and go upon private property until the difficulty encountered was overcome, when a return could be made to the highway; or if sufficient land could not be had in the streets for side tracks, turnouts, or stations, and the same were necessary for a successful

> operation of the road, under the statute the company would have the right to resort to private property.' S. C. Aurora, etc., R. R. Co. *v.* Harvey, 178 Ill., 477, 53 N. E., 331; Harvey *v.* Aurora, etc., Ry. Co., 186 Ill., 286, 57 N. E., 857. Same point: Hartshorn *v.* Ill. Val. Traction Co., 210 Ill., 609, 71 N. E., 612."

The City contends in its brief that the appellee is simply a horse railway company. In addition to the answer already made to the claim we will add a few lines as further answer.

The ordinance of 1875 does not bear out the City's claim. Section 1 of the ordinance of 1875 provides (fol. 6, Record) that—

> "The Minneapolis Street Railway Company be and is hereby granted, during the term of its charter, the exclusive right and privilege of constructing and operating a single or double track for a PASSENGER RAILWAY LINE, in such streets of said city as the council may deem suited to street railways, subject to the terms, conditions and forfeitures HEREINAFTER CONTAINED."

There is no limitation upon motive power in this section. This is a grant from the city authorizing the construction and operation of a single or double track for a PASSENGER RAILWAY LINE, and upon the CONDITIONS AND FORFEITURES HEREAFTER NAMED, to wit, named in the ordinance itself.

Section 2 of the ordinance says:

> "The AFORESAID GRANT (this recognizes the preceding section as containing the grant) is upon the express condition (that refers to the conditions mentioned in section 1 that will be named hereafter) that within four months from the passage of the ordinance the company shall construct and put in operation certain lines within a specified time, etc."

Section 3 provides for forfeitures of the exclusive right granted in section 1 of the ordinance whenever the com-

pany refuses to build new lines, or when it improperly operates existing lines.

Section 4 provides as to motive power, but there is no statement that the failure to use certain power is a CONDITION OR A FORFEITURE.

Section 17 provides that unless the ordinance is accepted it shall not be operative to vest any right or privilege or franchise whatsoever. The council has specified SOME CONDITIONS and forfeitures, and has by so doing excluded all other conditions and forfeitures.

That it was the intention to grant a franchise for a STREET RAILWAY, and not for a HORSE RAILWAY, seems clear from the language of the ratifying act of March, 1879. That act provides:

> "Whereas, the City of Minneapolis did by an ordinance entitled, etc., * * * grant to the Minneapolis Street Railway Company the right to construct and maintain a STREET RAILWAY THROUGH THE STREETS OF SAID CITY, WITH CERTAIN RIGHTS AND PRIVILEGES, etc. * * * Now the said right to construct and maintain said STREET RAILWAY THROUGH the streets of said city with the rights and privileges as set forth and qualified by said ordinance is hereby legalized and granted to said company."

It seems to us that this is a specific legislative declaration that the ordinance gave the right to opereate STREET RAILWAYS without limitation as to motive power by which such street railways shall be operated, and not simply the right to build a HORSE RAILWAY.

The Detroit ordinances under consideration in the Detroit case are as follows (see page 21, Record). It was a grant from the city:

> "To lay a single or double track for a railway, with all necessary and convenient tracks for turnouts, side tracks and switches in and along the course of the streets of and bridges in the City of Detroit hereinafter mentioned, and the same to keep, maintain and

use, and to operate thereon railway cars and carriages during all the time hereinafter specified and described * * * and upon the conditions set forth in this ordinance.

"SECTION 2. The said grantees are by the provisions of this ordinance exclusively authorized to construct and operate railways as herein provided on and through Jefferson Street, etc.

"SECTION 7 (p. 29, Record).

"The cars to be used on said railway shall be drawn by ANIMALS ONLY."

The ordinance under consideration in the Citizens' Railway case, 166 U. S., 557, was as follows (pages 2 and 3, Record):

"SEC. 1. Be it ordained by the Common Council of the City of Indianapolis, that under and by virtue of an act of the General Assembly of the State of Indiana entitled 'An act for the incorporation of street railway companies;' approved June 4, 1861, and by virtue of the powers and authority of the Common Council otherwise by law vested, consent, permission and authority are hereby given, granted and duly vested unto the company organized with R. B. Catherwood as President, a body corporate and politic by the name of the 'Citizens' Street Railway Company of Indianapolis,' and their successors, to lay a single or double track for passenger railway lines, with all the necessary and convenient tracks for turnouts, side tracks and switches, in, upon and along the course of the streets and alleys of the City of Indianapolis hereinafter mentioned, and to keep, maintain, use and operate thereon railway cars and carriages in the manner and for the time and upon the conditions hereinafter prescribed.

"SECTION 3. The cars to be used on such tracks shall be operated with ANIMAL POWER ONLY, and shall not connect with any other railway on which other power is used, and no railway car or carriage used upon any other railway in this State shall be used upon any of said tracks."

4

In these cases it was contended that the grant was to build horse railways only. The contention was not adopted by the court.

In Govin *v.* Chicago, 132 Fed., 848-856, the court as to motive power says:

> "Nothing better illustrates the legislative purpose in that respect, and perhaps the wisdom of that purpose, than the vicissitudes through which the physical and administrative sides of street railways have since come. The motive power then was animal; since it has been superseded by cable lines, and these in turn by electricity. Wood paving is giving way to granite and asphalt; the size of cars used is increasing; and there are many other like changes, illustrating that while the franchise itself might run for a long period, the regulation of the manner of its exercise should be left pliable to the changing needs of time and progress."

This construction was apparently adopted on appeal by this court (Blair *v.* Chicago, 201 U. S.), where this court said:

> "Whatever rights and privileges the street railway companies had in the Chicago streets under the compromise ordinance of July 10, 1883, as amended August 6, 1883, after the expiration of the time limitation in the 'power ordinance' of June 7, 1886, and March 30, 1888, were not lost by the acceptance of the privileges conferred by these ordinances, which provided that privileges as to time, after the expiration of the term fixed therein, were to be governed by prior ordinances."

There is no more justification for calling this a HORSE RAILWAY OR AN ANIMAL RAILWAY than there is in calling it a PNEUMATIC RAILWAY. There were experiments in the building of pneumatic railways about this time. Large engines were constructed for compressing air, and this compressed air was used experimentally in propelling street cars.

This experimental pneumatic railway would have been as radically different from animal or horse railway as the electric railway is different from the horse railway. If counsel's contention is correct, we have a horse or animal railway, and at the same time a pneumatic railway. This seems unreasonable. The purpose was to grant one franchise for the operation of a PASSENGER RAILWAY, and the motive power used depended upon progress and invention. Pneumatic power as propelling street railway cars was not in use at that time. It was one of the possible powers that might at some time be used for the purpose of propelling street cars. The city was looking to the future, and the use of the word "pneumatic" in this connection is of itself a strong evidence that it was the intention of the parties that pneumatic power or any other power better than horses, created by inventive genius, should be adopted by the railroad company with the city's consent.

As to word "railway," because of the stress laid upon the meaning of the word. It is not essential to appellee's case that the term "railway" shall include street railways. The words "work of internal improvement" suffice. But at the time the appellee's articles were filed the word "railway" had not been construed by our court to exclude street railways in any statute. The Funk case had not been decided. This subsequent decision cannot make the incorporation of appellee unlawful.

In Sheldon *v.* Chicago, 9 Wall., 50, the court held:

> "A contract having been entered into between the parties, valid at the time by the laws of the State, no decision of the courts of the State subsequently made can impair its obligation."

In Knox County *v.* 9th Nat. Bank, 147 U. S., 91, the court says:

> "Decisions of State courts upon the requirements of State statutes for validating issues of municipalities in the State when made or made subsequent to an

issue of such bonds, are not controlling in litigations in Federal courts involving the validity of such issues."

Cass County *v.* Johnson, 95 U. S., 360.
Davies County *v.* Heidekopfer, 98 U. S., 98.
Douglas *v.* Pike County, 101 U. S., 677.
Carroll County *v.* Smith, 111 U. S., 556.

In Vincennes *v.* Gas Light Co., 132 Ind., 121, the court said:

"It is insisted by the appellant that the ordinance is simply a grant of the franchise to lay pipes and mains in the streets, alleys and thoroughfares of the city for the purpose of supplying it, and its inhabitants, with gas; and that in such cases the grant is to be taken strongly against the grantee, and nothing is to be taken by implication against the public, except that which necessarily flows from the nature of the grant. Indianapolis, etc., R. R. Co. *v.* Citizens', etc., R. R. Co., 127 Ind., 369, and cases there cited sustain this doctrine where the ordinance simply grants a franchise. We are, however, of the opinion that the ordinance now under consideration is something more than a grant. It is a grant in so far as it confers upon the company the right to lay its mains and pipes in the public streets, and if the controversy in this case related to the nature and extent of that grant, these authorities would be in point and of importance.

"In addition to the grant above referred to, the ordinance embodies a contract between the city and the company for the supply of gas. It is this contract which is in dispute, and which furnishes the subject-matter of this controversy.

"The ordinance was, in effect, an offer by the city, the acceptance of which by the company created a contract between the parties, measured, like any other contract, by the terms and conditions of the writings. We see no reason why the contract thus formed should not be construed and interpreted like any other written contract.

"We are to look to the language employed, and in case terms are ambiguous, or susceptible of more than one meaning, may, in order to arrive at the intention of the parties, inquire as to their situation at the time the contract was entered into, and the purpose to be accomplished by its execution. Beard *v.* Lofton, 102 Ind., 408; H. G. Olds Wagon Works *v.* Coombs, 124 Ind., 62; Lyon *v.* Lenon, 106 Ind., 567.

"In 5 Lawson Rights & Remedies, section 2316, the rule of interpretation is expressed in this language:

> " 'In all contracts where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application. So every part of a document should be construed with reference to the intention of the parties, as to the whole contract. To ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties using it, and the objects which they had in view.'

"We are forced to the conclusion that at the time the ordinance was enacted by the common council of the city, and accepted by the gas company, it was mutually understood that the company was to furnish gas for street lighting, and the city was to pay for gas so furnished, at the agreed price, for the period of twenty-five years."

In the case of St. Louis R. R. Co., *v.* N. W. St. Louis R. R. Co., 2 Mo. App. Rep., 69, it is held:

"1. It appears that under 'An act to authorize the formation of railroad associations and to regulate the same,' approved Dec. 13, 1855, it was competent to organize a street railway company in the city of St. Louis. But, in any event, such a company having been constituted under the forms prescribed in

said act, an act of the General Assembly, approved Jan. 16, 1860, recognizing the corporate organization, and defining its powers, etc., was effectual to place the existence of the corporation beyond question. Such an act was not 'retrospective in operation.'"

In Sparks *v.* Railroad Co., 212 Pa. St., 110, the court in its opinion says:

"One question remains, and that is whether or not the defendant company has a right to use electricity as the power for drawing or propelling cars along the tracks of its railroad. A good deal of what has been said under the previous head of this opinion is applicable to the present question. There is nothing in the act of 1868 which expressly requires that steam power shall be used in the running of cars upon railroad tracks, and although, as in the case of Potts *v.* Quaker City Elevated R. R. Co., 161 Pa. 396, it can be found in some cases that the courts have assumed and stated that the statute referred to related to steam railroads, we do not understand that it was intended to be decided that only steam could be used as a motive power. Undoubtedly in 1868 steam was the power exclusively used on railroads. Great progress, however, has since been made in scientific discovery and mechanical inventions, and other methods of propulsion are now, and have been for a considerable period of time, in common use; they have proved to be of great practical service in mitigation of nuisances and in the effective operation of public conveyances. Of these, electricity may be regarded as a signal instance. This subtle agent is more and more, in point of fact, coming into use on the railroads of the country; and no doubt many practical mechanics and engineers look forward to a day when it will, to a large degree, supplant steam as the motive power upon the railroads of the world.

"In the absence of any positive requirement that steam must be used as the motive power upon the defendant's railroad, we think courts would be altogether out of sympathy with the progress of events, and needlessly obstructive to public convenience if

> they should hold that railroad companies could not adapt themselves to changing circumstances and better methods in such matters without new and express legislative grant."

For these reasons we respectfully submit the decree appealed from should be affirmed.

M. D. MUNN,
N. M. THYGESON,
Solicitors for Appellee.

M. B. KOON,
Of Counsel.